Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HUGHES SALARIED RETIREES ACTION COMMITTEE, PETER FORMO, RICHARD E. MILLER and NORMAN C. RIGBY, Individually and as Members,

Petitioners,

vs.

ADMINISTRATOR OF THE HUGHES NON-BARGAINING RETIREMENT PLAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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92 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does Section 404 of the Employee Retirement Income Security Act of 1974, as amended, ("ERISA"), 29 U.S.C. § 1104 preserve the duty of a fiduciary of a trust, upon reasonable request, to provide a beneficiary with a list of the names and addresses of the other beneficiaries of the trust, or with some alternative mean, to communicate with them about the payment of benefits or administration of the trust?

2. Is the list of names and addresses of participants of an ERISA-governed pension plan an instrument under which the plan is operated requiring it to be produced at a reasonable cost pursuant to the disclosure provisions of ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4)?

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JURISDICTION

The judgment of the Court of Appeals, vacating a panel decision and affirming the judgment of the District Court dismissing the action, was entered on December 15, 1995 (a1). Jurisdiction of this Court is conferred by 28 U.S.C. §§ 1254(a) and 2106.

STATUTES INVOLVED

ERISA § 104(4), 29 U.S.C. § 1024(4)

> "(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence."

ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).

> "(a) Prudent man standard of care
>
> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter."

STATEMENT OF THE CASE

This Petition for a Writ of Certiorari seeks review of a 7 - 4 *en banc* decision vacating a 3 - 2 decision of a panel of the United States Court of Appeals for the Ninth Circuit (1a). At stake is the important right of a pension plan participant to communicate with his fellow participants in order to protect their interests as beneficiaries, a right enjoyed under common law but now removed by the Circuit Court. The issue is not simply ERISA required document disclosure, but is about maintaining the common law fiduciary duty of a trustee to permit the beneficiaries of a trust to communicate with their fellows about the administration of the trust. The majority decision of the *en banc* panel undermines a fundamental objective of ERISA, namely, to allow participants to police their own plans.

The action was brought by a group of pension plan participants to require the administrator of their plan to allow them to communicate with their fellow participants about matters concerning their pension benefits and plan administration and to allow them to organize a committee to assure that their rights as participants were being adequately protected by the plan fiduciaries. Petitioners are the Hughes Salaried Retirees Action Committee ("HSRAC") and three individual Plan participants who are members of HSRAC. HSRAC was formed by a group of retired employees of the Hughes Aircraft Company ("Hughes") as a "watchdog" committee to guard their pension rights. Hughes sponsors the Hughes Non-Bargaining Retirement Plan (the "Plan"), a pension plan as defined in Section 3(2)(A) of ERISA, 29 U.S.C. § 1002(2)(A). The Defendant-Respondent is the Plan's administrator (the "Administrator") as defined in ERISA section 3(16)(A), 29 U.S.C. § 1002(16)(A).

One of the reasons HSRAC sought the list of the names and addresses of Plan participants was so that they could write to them and seek their support in attempting to require the Administrator to increase pension benefits out of excess Plan assets. The Administrator refused the request to provide the list claiming that it was confidential. HSRAC then proposed, as an alternative to p. ducing the mailing list, that the Administrator mail their letter or make arrangements for a third party to mail it at HSRAC's expense so as to overcome any objection based on confidentiality. The Administrator also refused this request. Petitioners thereafter commenced this action in the District Court to compel the Administrator to provide them with the list.[1]

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[1] Approximately one year after this action was commenced, a group of HSRAC members brought a class action to compel Hughes to increase benefits out of plan surplus. That action was dismissed by the District Court and an appeal to the Ninth Circuit is currently pending. *Jacobson v. Hughes*

(continued...)

On July 9, 1991 the District Court entered an order granting the Administrator's motion to dismiss the complaint and denying HSRAC's cross-motion for Summary Judgment (56a). The District Court ruled that "because ERISA comprehensively addresses the information which participants should receive, the statute's fiduciary duty section should not be interpreted to mandate disclosure of additional information." (59a). The District Court further ruled that the disclosure provisions of ERISA do not require the production of a list of participants of the plan (61a).[2]

A three-judge panel of the Court of Appeals for the Ninth Circuit held in its decision of November 7, 1994 that the administrator of an ERISA governed pension plan has a fiduciary duty under section 404 of ERISA to supply a plan participant with a list of all plan participants when reasonably requested in

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[1](...continued)
Aircraft Co., Docket No. 93-55392 (9th Cir. 1993). It was about this proposed litigation that HSRAC sought, in part, to write to their fellow retirees.

[2] An appeal was taken from this order to the Ninth Circuit but was dismissed as premature because the District Court had not entered a judgment dismissing the action but had rather dismissed the complaint with leave to amend (52a). Petitioners thereafter moved the District Court for reconsideration of the order of dismissal on the basis of the Ninth Circuit's then recent decision in *Acosta v. Pacific Enterprises*, 950 F.2d 611 (CA 9, 1992) (which held that a Plan participant was entitled to a list of participants where such a request was related to the payment of benefits or defrayal of expenses). On December 14, 1992 the District Court orally denied HSRAC's motion for reconsideration but granted leave to file an amended complaint. On December 28, 1992 the Administrator moved to dismiss the amended complaint. The District Court granted the motion and on February 9, 1993 entered a final order and judgment dismissing the action with prejudice and without leave to amend. (52a, 55a). Petitioners timely appealed from the final judgment dismissing the action.

connection with the provision of benefits or the defrayment of costs (28a). The Court of Appeals also held that the list of participants had to be produced as an "instrument under which the plan is established or operated" in accordance with ERISA § 104(b)(4), 29 U.S.C. §1024(b)(4). (36a).

On December 15, 1995, an *en banc* panel of the Court of Appeals, in a seven to four decision, reversed the holding of the three judge panel ruling that neither the fiduciary duty provisions nor the disclosure provisions of ERISA required production of the list (1a). A vigorous dissent was written by Judge Pregerson and signed by three of his colleagues (20a).

ARGUMENT

A WRIT OF CERTIORARI SHOULD BE ALLOWED

A. The Decision of the Court of Appeals Below is in Conflict With Applicable Decisions of This Court.

The majority decision of the *en banc* panel of the Court of Appeals is in direct conflict with this Court's edict in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 S. Ct. 948, 955, 956 (1989) that ERISA was enacted to promote the interests of employees and their beneficiaries in employee benefit plans and not to afford less protection to employees and their beneficiaries than they enjoyed under the common law before ERISA was enacted.

> "ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans,' and 'to protect contractually defined benefits'. See generally 29 U.S.C. § 1001 (setting forth congressional findings and declarations of policy regarding

> ERISA). ***Adopting Firestone's reading of ERISA would require us to impose a standard of review that would afford iess protection to employees and their beneficiaries than they enjoyed before ERISA was enacted.***" *Id.* at 113, 114. (Citations omitted, emphasis supplied).

This Court, on numerous occasions, has announced and reaffirmed the principle that fiduciary obligations under ERISA section 404, 29 USC § 1104 are to be derived from the common law of trusts and incorporated into a federal substantive law. As stated in *Bruch:*

> "ERISA abounds with the language and terminology of trust law. See, e.g., 29 U.S.C. § § 1002(7) ("participant"), 1002(8) ("beneficiary"), 1002(21)(A) ("fiduciary"), 1103(a) ("trustee"), 1104 ("fiduciary duties"). ERISA's legislative history confirms that the Act's fiduciary responsibility provisions, 29 U.S.C. § § 1101-1114, "codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts." H.R.Rep. No. 93-533, p. 11 (1973), U.S.Code Cong. & Admin.News 1974, pp. 4639, 4649. Given this language and history, we have held that courts are to develop a "federal common law of rights and obligations under ERISA- regulated plans." (quoting 129 Cong.Rec. 29942 (1974) (remarks of Sen. Javits))." Id. at 110, 111.[3]

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[3] *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56, 107 S.Ct., 1549, 1558 (1987). *See also Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24, n. 26, 103 S.Ct. 2841, 2854, n. 26, 77 L.Ed.2d 420

(continued...)

> "[R]ather than explicitly enumerating all of the powers and duties of trusties and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility." *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570, 105 S.Ct. 2833, 2840 (1985).

Here, the majority opinion of the *en banc* panel of the Ninth Circuit has removed the important right of beneficiaries of a trust, enjoyed under common law, to communicate with their fellow beneficiaries in order to protect their interests in the trust. Under the common law of trusts a beneficiary is entitled to any and all information needed to enforce his rights under the trust even where the trust explicitly regulates the trustee's duty to furnish information. Restatement (Second) of Trusts, § 173. The general right to such information has been expressly translated into the right to know the identity of fellow beneficiaries so as to communicate with them about the administration of the trust. The definitive treatise G. Bogert & G. Bogert, *The Law of Trusts and Trustees* (Rev. 2d Ed. 1978), § 961, p. 7, states squarely that a

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[3](...continued)
(1983) (" '[A] body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans' "); *Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. 1223, 131 L.Ed.2d 94 (1995); *Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 113 S.Ct. 2252, 124 L.Ed.2d 522; *Mertens v. Hewitt Associates*, 508 U.S. 248, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993); *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 110 S.Ct. 680, 107 L.Ed.2d 782 (1990); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985); *N.L.R.B. v. Amax Coal Co., a Div. of Amax, Inc.*, 453 U.S. 322, 101 S.Ct. 2789, 69 L.Ed.2d 672 (1981).

"***beneficiary may demand a list of the other beneficiaries....***"[4], citing *Baydrop v. Second Natl. Bank*, 120 Conn. 322, 180 A. 469 (1935). *See also, Sobel v. Bess*, 373 NYS 2d 513, 49 AD 2d 591 (NYAD 1975), reversed on other grounds, 43 N.Y.2d 969, 404 N.Y.S.2d 595, 595-96, 375 N.E.2d 775, 775-76 ("Trustee shall furnish plaintiff with a list of beneficiaries of the trust"); *Corum Management Co., Inc., v. Aguayo Enterprises, Inc.*, 755 S.W. 2d 895, 900 (Texas Court of Appeals, 1988) ("trustee is required to provide a list of beneficiaries . . . ."). *Morris v. Broadview, Inc.*, 338 Ill.App. 99, 86 N.E.2d 863, 866 (1949) (citing *Morris v. Broadview, Inc.*, 328 Ill.App. 267, 65 N.E.2d 605, 607 (1946)), (beneficiaries in a voting trust were entitled to the names and addresses of their co-beneficiaries to enable them to solicit their co-beneficiaries' votes).

Further support for the right to a list is found in the common law of corporations.[5] Under the common law corporate shareholders had the right to inspect the list of shareholders if they sought the list for a "proper purpose."[6]

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[4] Both *Bruch, supra.* 489 US at 111, 109 S.Ct. at 954, and *Central States, supra.* 472 U.S. 55 9 at 570, n.11 and 572 n.13, both cite *Bogert* as an authoritative source of the common law of trusts. Compare this to the *en banc* decision which says it "adds nothing" and is insubstantial authority. (a14, n.6).

[5] In *Curtiss- Wright, supra.* this Court held that in determining the validity of an amendment of a trust document under ERISA, where the company, as here, was the plan fiduciary, the courts are to look to ordinary principles of trust and corporate law to determine whether a plan amendment is valid. "...Or they may want to retain the flexibility that designating '[t]he Company' ***(read in light of corporate law)*** provides them. . . . .' Cf. R. Clark, Corporate Law s 3.3.2 (1986)." 115 S.Ct. 1223 at 1231.

[6] The Model Business Corporation Act, followed by a majority of the states, grants shareholders inspection rights "for any proper purpose". 18

(continued...)

The two purposes which the petitioners seek to obtain the list, namely, to form a watchdog committee to and to raise support for litigation, have both been recognized as proper purposes for obtaining a list of shareholders of a corporation. *State ex. rel. Foster v. Standard Oil Co. of Kansas*, 41 De. 172, 18 A.2d 235, 238 (Superior Ct. 1941) (seeking a list of all shareholders in connection with litigation against the corporation's director, in order to communicate about the charges in the action and to raise support for the litigation, is on its face a "proper purpose"); *Tatko v. Tatko Bros. Slate Co, Inc.* 173 A.D.2d 917, 569 N.Y.S.2d 783 (N.Y.A.D. 3 Dept. 1991) (information in aid of legitimate litigation is a proper purpose); *Kahn v. American Pretzel Co.*, 365 Pa 161, 74 A.2d 160, 162 (1950) (it was a proper purpose for shareholders to request a list in order to form a watchdog committee to oversee the administration of the corporation and guard against financial abuses).[7]

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[6](...continued)
Mod. Bus. Corp. Act 2d § 52. While all states have now enacted laws regarding the inspection of corporate records, including the right to examine and copy a list of the shareholders, most authorities have stated, and cases have held, that unless a statute expressly repeals the common law, the shareholder possesses the common law in addition to the statutory right of inspection. *See e.g., Caspary v. Louisiana Land & Exploration Co.*, 707 F.2d 785 (CA 4 1983); *Tucson Gas & electric Co. v. Shantz*, 5 Ariz. App. 511, 428 P2d 686 (1967); *State ex. rel. Cochran v. Penn Beaver Oil Co.*, 34 Del. 81, 143 A 257 (Del. 1926); *Johncamp Realty, Inc. v. Sanders*, 98 Misc 2d 949, 415 NYS 2d 192 (1979). By analogy, even though ERISA enacted express disclosure rights, it did not repeal the rights available under common law.

[7] The Court of Appeal's holding that "we find nothing in ERISA suggesting that Congress intended to help plan participants amass a litigation war chest by soliciting donations from other plan participants and beneficiaries" (a15) is belied by these cases. In incorporating trust principles into ERISA Congress protected beneficiaries right to communicate
(continued...)

Congress recognized that a central legislative purpose of ERISA is to "enable employees to police their plans." H. Rep. No. 533, 93rd Cong., 1st Sess. 11, reprinted in 1974 U.S.Code Cong. & Admin. News 4639, 4649; S.Rep. No. 127, 93rd Cong., 1st Sess. 27, reprinted in 1974 U.S.Code Cong. & Admin. News 4838, 4863. As the House Committee Report explained:

> "It was expected [under the prior Act] that the information disclosed would enable employees to police their plans. But experience has shown that the limited data available under the present Act is insufficient. Changes are therefore required to increase the information and data required in the reports both in scope and detail. Experience has also demonstrated a need for a more particularized form of reporting so that the individual participant knows exactly where he stands with respect to the plan .... [T]he

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[7](...continued)
for all proper purposes including this one. Moreover, the Court of Appeals contention that producing the list when requested for a proper purpose under ERISA is "unworkable" (a12) is also undercut by these cases. This argument has no more validity here than under the common law of corporations. Under such law, if the list is not sought in good faith or the actual motive is improper, then production can be challenged in court. *Nationwide Corp. v. Northwestern Nat. Life Ins.Co.*, 251 Minn. 255, 263, 87 N.W.2d 671, 679, 73 A.L.R.2d 884 (S.Ct. Minn. 1958) ("Where the petition for an alternative writ of mandamus to compel the corporation to permit an inspection shows on its face that the inspection is for a proper purpose, a peremptory writ should be granted unless the defendant alleges as a defense facts tending to establish that it is not for such purpose. The burden of establishing an improper purpose rests upon defendant."). There is no basis in fact or law for a claim that the same system would be "unworkable" for pension plans, and indeed, this Court has similarly held that an employer fighting disclosure under ERISA must produce evidence that it is sought for an improper purpose. *Central States*, supra. 472 U.S. at 571, n12.

> safeguarding effect of the fiduciary responsibility section will operate efficiently only if fiduciaries are aware that the details of their dealings will be open to inspection, and that individual participants and beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general." H.Rep. No. 533, 93d Cong. 2d Sess. 11, reprinted in 1974 U.S.Code Cong. & Ad.News 4639, 4649.

What better way is there to guard participants' rights to benefits than to allow them the information needed to communicate with one another, a right enjoyed under common law? The minor administrative inconvenience and expense or incursion on privacy in supplying such a list, if any, anticipated (without factual support) by the Court of Appeals and amici below is clearly outweighed by the extreme benefit to retirees. The key issue in this case is the right of participants and beneficiaries of an ERISA governed trust to communicate with one another for the purpose of policing and protecting their rights under ERISA and insuring that the fiduciaries are acting in their exclusive interests. This case is not simply about document disclosure. Indeed, ***no document need even have been produced as HSRAC agreed that the Administrator or a third party could do the mailing without producing the list.***[8] If the *en banc* decision of the Ninth Circuit is affirmed, the ability of participants to enforce their rights under ERISA, will be substantially impaired and in some instances erased entirely. Unless retirees can communicate with one another and organize to protect their rights under ERISA and under the plan, they will not be able to raise the support, whether in numbers or in dollars, needed to

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[8] *See* dissenting opinion of Judge Pregerson at 23a, 24a.

enforce their rights against a well-funded pension plan sponsored by a large corporation.[9]

Here, as in *Bruch, supra.* the Court should not afford less protection to Plan beneficiaries under ERISA than was afforded under common law.

B. The Court of Appeals Below Has Decided an Important Question Which Has Not Been But Should be Settled by This Court.

The second question presented, whether a list of names and addresses of plan participants and beneficiaries is an instrument under which the plan is operated, involves a question of vital public concern which should be settled by this Court. The Supreme Court has never addressed the issue of the scope of

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[9] This is especially true in a situation such as this one where the Administrator is the very corporation which will benefit by using the enormous surplus to meet it's own funding obligations rather than for improving pension benefits. As a fiduciary, the Administrator owes his strict and undivided loyalty to the Plan participants and beneficiaries. In this case, however, where one of the underlying issues concerns the use of a huge pension surplus, it is apparent that the Administrator is acting on behalf of Hughes in attempting to stifle communication. ERISA imposes upon fiduciaries the highest standard of fiduciary responsibility "known to law." *Donovan v. Bierwirth*, 680 F.2d 263, 272, n. 8 (CA 2 1982), *cert. denied*, 459 U.S. 873, 103 S. Ct. 488 (1982). As stated in *Bierwirth* the decisions of the fiduciary must be made with "an eye single to the interests of the participants and beneficiaries," 680 F.2d at 271. Indeed, the Ninth Circuit has held that ERISA makes even "more exacting the requirements of the common law of trusts...." *Donovan v. Mazzola* 716 F.2d 1226, 1231 (CA 9 1983), cert. denied 464 US 1040, 104 SCt 704 (1984).

disclosure required by ERISA § 104, 29 U.S.C. § 1024 and the lower federal courts have disagreed on a consistent standard.[10]

The importance of this issue is underscored in *Central States Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 578, 105 S. Ct. 2833, 2844, 86 L.Ed. 2d 447 (1985). This Court recognized that the number of employee benefit plans in this country is so vast that it is impossible for the United States Department of Labor to police and monitor them:

> "There are also compelling reasons why the Department of Labor's power to police employer compliance must be rejected as an alternative to audits by the plans themselves. Indeed, the structure of ERISA makes clear that Congress did not intend for Government enforcement powers to lessen the responsibilities of plan fiduciaries.
>
> First, the Department of Labor denies that it has the resources for policing the day-to-day operations of each multiemployer benefit plan in the Nation. The United States, as *amicus*, informs us that approximately 900,000 benefit plans file annual reports with the Secretary of

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[10] *Compare Werner v. Morgan Equip. Co.*, 15 Employee Benefits Cas. 2295 (N.D.Cal.1992) (valuation reports are within ERISA s 104(b)(4) because they are used to "carry out" the determination of benefits, which is "a regular, required and necessary function of the operation of the [plan]") and *Lee v. Dayton Power and Light Co.*, 604 F.Supp. 987, 1002 (S.D.Ohio 1985) (a manual containing charts essential to the calculation of benefits is an "underlying plan document" and therefore, an instrument under which the plan is established or operated) with *Chambless v. Masters, Mates & Pilots Pension Plan*, 571 F.Supp. 1430, 1456-57 (S.D.N.Y.1983) (minutes of trustee meetings and decisions are not within ERISA § 104(b)(4)).

> Labor, and that between 11,000 and 12,000 of these are multiemployer plans. As the petitioners' situations illustrate, some multiemployer plans can be quite large. See n. 1, *supra*. It is therefore not surprising that the United States argues that "[I]t is thus wholly unrealistic to suggest that centralizing all auditing authority in the Secretary would provide protection to benefit plan participants comparable to that afforded by trustee audits." Brief for United States as *Amicus Curiae* 20, n. 11." 472 U.S. at 578, 105 S. Ct. at 2844.[11]

Unless the information necessary for self policing is made available to plan participants they are at the mercy of unscrupulous fiduciaries. The legislative history of ERISA discussed above makes it clear that one of Congress's major concerns was that participants be armed with sufficient information to protect their interests so that they could police their own plans.[12]

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[11] In 1992 there were 708,335 *pension* plans alone registered with the Department of Labor with a total of 81,914,000 participants and having assets of $2,094,087,000. *Private Pension Plan Bulletin, Abstract of 1992 Form 5500 Annual Reports*, U.S. Department of Labor , Pension and Welfare Benefits Administration, Office of Research and Economic Analysis Number 5, Spring 1996. These huge numbers highlight the importance of this issue.

[12] H. Rep. No. 533, 93rd Cong., 1st Sess. 11, reprinted in 1974 U.S.Code Cong. & Admin. News 4639, 4649; S.Rep. No. 127, 93rd Cong., 1st Sess. 27, reprinted in 1974 U.S.Code Cong. & Admin. News 4838, 4863, cited in *U.S. v. Sarault*, 840 F.2d 1479, 1484 (CA 1988) and *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), *cert. denied* 474 U.S. 865, 106 S.Ct. 183 (1985). The Blau court noted that a salutary purposes behind ERISA's reporting and disclosure provisions--to ensure that to "enable

(continued...)

Given the legislative history of ERISA, section 104 should be read broadly and consistently with the legislative purpose so as to permit participants to effectively police their plans and enforce their rights. *Lee v. Dayton Power and Light Co.*, 604 F. Supp. 987, 1002 (S.D. Ohio 1985) interpreted this provision in a manner consistent with the legislative purpose as follows:

> "The sparse legislative history of this section reveals Congressional interest in making underlying Plan documents available to participants to further their understanding of their ERISA-covered plans *and to aid in their policing of such plans*. S. Rep. No. 127, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad.News 4838, 4847, 4863-64. Given this legislative history and the plain language of the statute, an administration manual containing charts essential to the calculation of retirement benefits appears to this Court to constitute an 'instrument[s] under which the Plan is established or operated.'"

The list of participants is a fundamental document crucial to the operation of the plan. Aside from the plan itself, the list of participants is without doubt the most important document required for the operation of the plan. Black's Law Dictionary defines a "Trust Instrument" as the "formal document which creates the trust and contains the powers of the trustees and the rights of the beneficiaries." The list of the beneficiaries granted rights is an "instrument" just as a list of legatees of a will or beneficiaries of a common law trust would be. The list of names

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[12](...continued)
employees to *police* their plans."

of participants states the persons who are the beneficiaries of the trust. It is akin to a list of the beneficiaries of a common law trust or of a will. It is an inherent part of the basic trust instrument and has binding legal force.

Given the importance of this issue, and the lack of clarity and the conflict among the lower courts the Supreme Court guidance on the interpretation of Section 102, the petition for a writ of certiorari should be granted on this question.

CONCLUSION

The petition for Writ of Certiorari should be granted.

Dated: New York, New York
February 22, 1996

Respectfully submitted,

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APPENDIX

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(CITE AS: 72 F.3D 686)

HUGHES SALARIED RETIREES ACTION COMMITTEE; Peter Formo; Richard E. Miller; Norman C. Rigby,

Plaintiffs-Appellants,

v.

ADMINISTRATOR OF the HUGHES NON-BARGAINING RETIREMENT PLAN,

Defendant-Appellee.

No. 93-55384.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted Nov. 4, 1993.

Opinion Filed Nov. 7, 1994.

Order Granting Rehearing En Banc July 14, 1995.

Argued and Submitted July 20, 1995.

Decided Dec. 15, 1995.

Individual retirees, and committee formed to communicate with Employee Retirement Income Security Act (ERISA) participants about their rights under employer's ERISA plan, brought action against plan administrator alleging breach of

fiduciary duties and violation of disclosure requirements. The United States District Court for the Central District of California, Richard A. Gadbois, Jr., J., dismissed complaint for failure to a claim. Retirees and committee appealed. The Court of Appeals, Pregerson, Circuit Judge, 39 F.3d 1002, affirmed in part, and reversed and remanded in part. On rehearing en banc, the Court of Appeals, William A. Norris, Circuit Judge, held that: (1) ERISA section requiring plan administrator upon request to furnish specified documents or other instruments under which plan is established or operated did not require plan administrator to furnish individual participants upon request with names and addresses of other plan participants, and (2) plan administrator did not have a general fiduciary duty under ERISA to furnish individual participants with names and addresses of other plan participants. Opinion of original panel vacated, and judgment of District Court affirmed. Pregerson, Circuit Judge, filed a dissenting opinion in which Hug, Fletcher and Reinhardt, Circuit Judges, joined.

[1] FEDERAL COURTS k668 170Bk668 Period for filing a notice of appeal is tolled until judgment is set forth in a separate document. F.R.A.P.Rule 4(a)(1), 28 U.S.C.A.

[2] PENSIONS k47 296k47 Names and addresses of other ERISA plan participants did not constitute an "instrument under which the plan is established or operated," for purposes of ERISA section requiring a plan administrator to furnish upon request a copy of latest updated summary plan description, plan description, latest annual report, any terminal report, bargaining agreement, trust agreement, contract, or other instruments under which plan is established or operated; unlike specifically listed documents, participants' names and addresses provided no information about plan or benefits, and it would have strained meaning of statute to interpret it to include participant names and addresses. Employee Retirement Income Security Act of

1974, § 104(b)(4), as amended, 29 U.S.C.A. § 1024(b)(4). See publication Words and Phrases for other judicial constructions and definitions.

[3] STATUTES k193 361k193 Words grouped in a listing of statutes should be given related meaning.

[4] PENSIONS k47 296k47 "Other instruments under which the plan is established or operated" within meaning of ERISA section requiring that plan administrator upon written request furnish a copy of latest updated summary plan description, plan description, latest report, any terminal report, bargaining agreement, trust agreement, contract, or other instruments under which plan is established or operated, is limited to documents that are similar in nature to the documents specifically listed in the statute. Employee Retirement Income Security Act of 1974, § 104(b)(4), as amended, 29 U.S.C.A. § 1024(b)(4). See publication Words and Phrases for other judicial constructions and definitions.

[5] PENSIONS k43.1 296k43.1 ERISA's general fiduciary duty provision requiring a plan fiduciary to discharge his duties solely in the interest of participants and beneficiaries for the exclusive purpose of providing benefits and defraying reasonable expenses did not require plan administrator to disclose to individual participants upon request the names and addresses of other plan participants inasmuch as disclosure would not provide information relating to provision of benefits or defrayment of expenses. Employee Retirement Income Security Act of 1974, § 404(a)(1)(A), as amended, 29 U.S.C.A. § 1104(a)(1)(A).

[5] PENSIONS k47 296k47 ERISA's general fiduciary duty provision requiring a plan fiduciary to discharge his duties solely in the interest of participants and beneficiaries for the

exclusive purpose of providing benefits and defraying reasonable expenses did not require plan administrator to disclose to individual participants upon request the names and addresses of other plan participants inasmuch as disclosure would not provide information relating to provision of benefits or defrayment of expenses. Employee Retirement Income Security Act of 1974, § 404(a)(1)(A), as amended, 29 U.S.C.A. § 1104(a)(1)(A).

[6] PENSIONS k47 296k47 Any disclosure duty that ERISA's general fiduciary duty provision imposes on fiduciaries is limited to disclosure of information that relates to provision of benefits for defrayment of expenses, which are the exclusive purposes for which ERISA fiduciary may discharge its duties. Employee Retirement Income Security Act of 1974, § 404(a)(1)(A), as amended, 29 U.S.C.A. § 1104(a)(1)(A).Jerome Tauber, Richard Dorn, Sipser, Weinstock, Harper & Dorn, New York City, for plaintiffs-appellants.Robert F. Walker, Paul, Hastings, Janofsky & Walker, Santa Monica, California, for defendant-appellee. Appeal from the United States District Court for the Central District of California.

Before: WALLACE, Chief Judge, HUG, FLETCHER, PREGERSON, CANBY, NORRIS, REINHARDT, WIGGINS, BRUNETTI, O'SCANNLAIN, and RYMER, Circuit Judges. Dissent by Judge PREGERSON.

WILLIAM A. NORRIS, Circuit Judge:

This appeal presents two questions:(1) whether § 104(b)(4) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1024(b)(4), requires a plan administrator to furnish individual participants upon request with the names and addresses of other plan participants. We hold that it does not because such a list is not an "instrument[ ]

under which the plan is established or operated," id.;(2) whether a plan administrator has a general fiduciary duty under ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A), to furnish individual participants with the names and addresses of other plan participants. We hold that it does not because this information is not related to "providing benefits to participants and their beneficiaries [or] defraying reasonable expenses of administering the plan," the exclusive purposes for which the plan administrator may discharge its duties, id.

I

BACKGROUND

Plaintiffs are three retirees (the "Retirees") who receive defined pension benefits from the Hughes Non-Bargaining Retirement Plan (the "Plan"). They are members of a self-appointed committee called the Hughes Salaried Retirees Action Committee, an organization that is also a named plaintiff. The Plan has some 60,000 participants, of whom some 10,000 are retirees. The Retirees brought this action under ERISA to compel the Plan administrator (the "Administrator") to furnish them with a list of the names and addresses of all retired participants of the Plan so the Retirees can "communicate with them about matters of concern to all retired participants regarding their pensions...." Am.Compl. P 1. In particular, the Retirees say they want to communicate with other retirees about Hughes's allegedly "unlawful use of excess Plan assets for the sole purpose of meeting Hughes' funding obligations" and "to gain support for their efforts to obtain increased benefits

through negotiation or if required, litigation, as well as to monitor the Plan." [1] Id. at P 10.

[1] The district court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. A three-judge panel of our court reversed.[2] Hughes *689 Salaried Retirees Action Comm. v. Administrator of the Hughes Non-Bargaining Retirement Plan, 39 F.3d 1002 (9th Cir.1994). A majority of the active judges of the court voted to rehear the case en banc, 53 F.3d 1090 (9th Cir.1995), and we now vacate the panel's opinion and affirm the judgment of the district court dismissing the complaint for failure to state a claim upon which relief may be granted.

II

ERISA § 104(b)(4)

[2] We first consider the Retirees' claim that the Administrator must furnish them with the names and addresses of retired Plan

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[1] In a related appeal, Jacobson v. Hughes Aircraft Co., No. 93-55392, five other retirees who receive benefits from the Plan sought a termination of the Plan and a distribution of the assets to Plan participants because of Hughes's allegedly improper use of Plan assets. The complaint in that case was dismissed by the district court for failure to state a claim. Order of Dismissal of Action, filed Feb. 9, 1993. That appeal is currently pending before this court.

[2] The Administrator argues that the appeal is untimely because the notice of appeal was filed more than 30 days from the district court's entry of the Civil Minutes on January 20, 1993. However, the appeal is timely because the period for filing a notice of appeal is tolled until the judgment is set forth in a separate document. See Fed.R.App.P. 4(a)(1); Vernon v. Heckler, 811 F.2d 1274, 1276 (9th Cir.1987).

participants because this information is an "instrument[ ] under which the plan is established or operated" within the meaning of ERISA § 104(b)(4). Am.Compl. PP 18-20. Section 104(b)(4) provides: The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make reasonable charge to cover the cost of furnishing such complete copies.29 U.S.C. § 1024(b)(4) (emphasis added). According to the Retirees, the requested list of names and addresses falls within the statute because the Plan could not operate without it. The district court, in rejecting the Retirees' interpretation, explained: Such an interpretation so strains the meaning of [s 104(b)(4)]'s language that it is impossible to conceive of any documents even tangentially related to an employee benefit plan which would not fall within its scope. Moreover, if there are limits, there is no way that [the Retirees'] reading of the statute would allow a plan administrator to know what they are. Such a result would subvert the intent of Congress to provide "detailed and uniform guidance" as to what information must be furnished to plan participants. Order of Dismissal, filed July 9, 1991, at 6.We agree with the district court that the Retirees' interpretation of § 104(b)(4) would "strain the meaning" of the section. The district court reasoned: Statutory construction of ERISA " 'must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.' " Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 [105 S.Ct. 2380, 2389, 85 L.Ed.2d 728] (1985) (quoting Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 [105 S.Ct. 658, 661, 83 L.Ed.2d 582] (1985)). Following this approach, a list of plan participants cannot possibly be considered an instrument "under which the plan is established or operated." The plain language

of the statute limits the universe of documents falling within that phrase to documents similar in nature to those specifically identified, which describe the terms and conditions of the plan, as well as its administration and financial status. While this Court need not define precisely those documents falling under that provision, it is clear that a list of plan participants does not. Obtaining such a list provides participants with absolutely no information whatsoever about the plan, and therefore ERISA neither requires nor contemplates its disclosure. Id. at 627.[3] We agree with the reasoning of the district court. It is well established that " 'words grouped in a list should be given related meaning.' " See, e.g., Massachusetts v. Morash, 490 U.S. 107, 114-15, 109 S.Ct. 1668, 1673, 104 L.Ed.2d 98 (1989) (quoting Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 8, 105 S.Ct. 2458, 2462, 86 L.Ed.2d 1 (1985)) (interpreting "vacation benefits" in ERISA § 3(1) in light of other benefit plans listed in same section). The Supreme Court has recently characterized the documents *690 subject to § 104(b)(4)'s disclosure requirements as "governing plan documents." Curtiss-Wright Corp. v. Schoonejongen, --- U.S. ----, ----, 115 S.Ct. 1223, 1231, 131 L.Ed.2d 94 (1995). The relevant documents are those documents that provide individual participants with information about the plan and benefits. As the legislative history bears out, the documents contemplated by § 104(b)(4) are those that allow "the individual participant [to] know[ ] exactly where he stands with respect to the plan--what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, what procedures he must follow to obtain benefits, and who are the persons to whom the management and investment of his plan funds have been entrusted." S.Rep. No. 127, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 4838, 4863.[3]

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[3]The Committee on Labor and Public Welfare explained in fuller detail:

(continued...)

Unlike the documents specifically listed in § 104(b)(4)--plan descriptions, annual and terminal reports, and bargaining and trust agreements--participants' names and addresses provide no information about the plan or benefits. As the district court said so aptly, it would strain the meaning of "other instruments under which the plan is operated" to interpret it to include participant names and addresses. Cf. Werner v. Morgan Equip. Co., 15 Employee Benefits Cas. (BNA) 2295, 2301, 1992 WL 453355 (N.D.Cal.1992) (stock valuation report is an instrument under which a plan is established or operated when the plan measures benefits by the value of stock); Lee v. Dayton Power & Light Co., 604 F.Supp. 987, 1002 (S.D.Ohio 1985) (manual containing charts essential to the calculation of benefits is an instrument under which the plan is established or operated).In reversing the district court, our original panel reasoned that § 104(b)(4) requires disclosure of all documents that are "critical to the operation of the plan." Hughes, 39 F.3d at 1007. This test, however, admits of no limiting principle. For example, under

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[3](...continued)

[E]xperience has shown that the limited data available under [ERISA's predecessor] is insufficient. Changes are therefore required to increase the information and data required in the reports both in scope and detail. Experience has also demonstrated a need for a more particularized form of reporting so that the individual participant knows exactly where he stands with respect to the plan--what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, what procedures he must follow to obtain benefits, and who are the persons to whom the management and investment of his plan funds have been entrusted. At the same time the safeguarding effect of the fiduciary responsibility section will operate efficiently only if fiduciaries are aware that the details of their dealings will be open to inspection, and that individual participants and beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general. S.Rep. No. 127, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 4838, 4863.

this interpretation, an administrator of a medical plan would be required to disclose medical histories of participants in the plan, and the administrator of a pension or profit-sharing plan would be required to disclose wage records of participants, because the medical histories and wage records are crucial to the operation of the respective plans. It is fanciful to think that § 104(b)(4) was enacted to give plan participants an absolute right to obtain such information about other plan participants. Indeed, under the original panel's interpretation of § 104(b)(4), a plan administrator would be required to disclose virtually everything in its plan files upon request. The panel reasoned that the language "other instruments" is not limited to documents similar to the documents specifically listed in § 104(b)(4) because the statutory language "contains no such limitation, and we have found no other authority for limiting the statutory language this way." Id. at 1008. In other words, according to the panel, § 104(b)(4) creates a generalized disclosure obligation subject only to articulated limits. See also id. at 1008 n. 8 ("The language of the statute does not contain the limitation the *691 Administrator urges us to adopt....") (emphasis in original). We reject the reasoning of the panel. Under its interpretation of § 104(b)(4), it would be "impossible to conceive of any documents even tangentially related to an employee benefit plan which would not fall within [s 104(b)(4)]'s scope." Order of Dismissal, filed July 9, 1991, at 16. Such a broad disclosure requirement, however, is not supported by either the language of the statute or its legislative history. Thus we decline to interpret § 104(b)(4) to require general disclosure, subject only to specified exceptions. On the contrary, § 104(b)(4) requires the disclosure of only the documents described with particularity and "other instruments" similar in nature.[4] In sum, we agree with the district court that "other instruments under which the plan is established or operated" is limited to documents that are similar in nature to the documents specifically listed in §

104(b)(4). A list of the names and addresses of plan participants is not such a document.[4]

III

ERISA § 404(a)(1)(A)

[5] Retirees claim in the alternative that even if § 104(b)(4) does not require the Administrator to disclose the names and addresses, ERISA's general fiduciary duty provision does. See ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A). Section 404(a) is a general standard of care provision that requires an ERISA plan fiduciary to "(1) ... discharge his duties ... solely in the interest of the participants and beneficiaries and (A) for the exclusive purpose of (i) providing benefits ... and (ii) defraying reasonable expenses...."[5]

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[4] Because we hold that the Administrator's refusal to disclose the names and addresses does not violate § 104(b)(4), we also affirm the district court's dismissal of the Retirees' § 404(a)(1)(D) claim, which is predicated on a § 104(b)(4) violation.

[5] ERISA § 404 provides in relevant part:

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and–

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan....

(continued...)

In their original complaint, the Retirees asserted three purposes for requesting the names and addresses of plan participants: communicating with other retirees about Hughes's use of Plan assets; gaining support for their negotiation or litigation efforts to obtain increased benefits; and monitoring the Plan. Compl. P 10. In dismissing the Retirees' § 404(a)(1)(A) claim, the district court noted that ERISA already contains a comprehensive disclosure scheme (s 104(b)(4)), and held that, "whatever the precise duties of a plan fiduciary under [s 404(a)(1)(A)], those duties relate to and are limited to the obligations to provide benefits to plan participants and beneficiaries, to defray reasonable expenses in administering the plan, and to act with the requisite care and skill in conducting the affairs of employee benefit plans." Order of Dismissal, filed July 9, 1991, at 5. The district court held that the Administrator had no duty to disclose the names and addresses of participants because that information was not related to any of these purposes. Id. The Retirees filed a motion for reconsideration based on Acosta v. Pacific Enters., 950 F.2d 611 (9th Cir.1991), which was decided after the district court dismissed the Retirees' complaint. In Acosta, a plan beneficiary requested a list of the names, addresses, and number of shares each plan participant owned in the employer corporation, id. at 614-15, for the transparent purpose of forming a shareholder coalition to elect corporate directors tending to favor liberal pension benefits. We held that § 404(a)(1)(A) did not *692 give rise to a duty to disclose the requested information because the right to vote was not a plan benefit and, thus, the plaintiff had not shown that "the disclosure requested ... [was] sufficiently related to the provision of benefits or the defrayment of expenses." Id. at 619.The district court denied the Retirees' motion for reconsideration but

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[5](...continued)
ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A).

granted them leave to amend their complaint. Tr. of Proceed'gs, Dec. 14, 1992, at 11. In their amended complaint, the Retirees alleged that § 404(a)(1)(A) encompasses a duty to provide the participant list when sought "for purposes of communicating with the participants and beneficiaries of the Plan about matters concerning the provision of benefits and the administration of the plan." Am.Compl. P 15. They further alleged that the dispute at issue--whether ERISA requires the Plan to distribute all or part of the allegedly "surplus" assets to the beneficiaries in the form of increased pension benefits--"is a matter concerning the provision of benefits and administration of the Plan which entitles the plaintiffs to a copy of the list of Plan participants." Id. at P 16.The district court again dismissed. Order of Dismissal, filed Feb. 9, 1993, at 8-9. The court quoted its 1991 Order of Dismissal, noting that the test it had used then--whether the request for information related to " 'provid[ing] benefits to plan participants ... or defray[ing] reasonable expenses,' "--was the test "subsequently adopted in Acosta." Id. at 3 (quoting Order of Dismissal, filed July 9, 1991). The court went on to say that "[Retirees'] inconsequential amendments likewise fail to bring their first amended complaint within the test set forth in Acosta." Id. at 5. The court reasoned that the Retirees were not seeking "information about the provision of benefits from the Plan," id. at 6-7, but rather "access to others to solicit financial support for their related case in which they hope to obtain the Plan's surplus assets." Id. at 6. The district court concluded that § 404(a)(1)(A) did not require disclosure of the list because the list itself provides no information or access to information related to the provision of benefits or the defrayment of expenses. Id. On appeal, the Retirees argue that the district court misapplied the Acosta test. They contend that the issue is not whether the information itself relates to the provision of benefits, as the district court had reasoned, but rather whether the Retirees' asserted purpose in requesting the information relates to the provision of benefits. The Retirees maintain that

their purpose relates to the provision of benefits because they seek the list in order to communicate with other retirees about joining together in an effort to obtain greater benefits. Our three-judge panel reversed the district court. Hughes, 39 F.3d at 1007. According to the panel, the district court incorrectly "focused on the information the list provides rather than the Retirees' purpose for seeking it.... [Under Acosta] [o]nly the Retirees' purpose for wanting the list, not the list itself, must relate to the provision of benefits." Id. at 1006-07 (emphasis in original). Thus the panel agreed with the Retirees that the focus of the inquiry should not be the nature of the information but the Retirees' asserted purpose. The panel concluded: Access to the list could help the Retirees to secure what they perceive to be their rights under the Plan. This connection between the requested list and the "provision of benefits" satisfies our test in Acosta. Therefore, the Administrator had a fiduciary duty to disclose the list. Id. at 1006 (emphasis added).[6] In using a subjective test--the Retirees' asserted purpose for requesting the information--rather than an objective test--the nature of the requested information itself--the panel misread and misapplied Acosta. In Acosta, the inquiry was "whether the disclosure requested ... is sufficiently related to the provision of benefits or the defrayment of expenses." Acosta, 950 F.2d at 619 (emphasis added). In using an objective test, Acosta is firmly grounded in the language *693 of § 404(a)(1)(A), which provides that the fiduciary shall discharge his duties "for the exclusive purpose of: (i) providing benefits ... and (ii) defraying reasonable expenses...." 29 U.S.C. § 1104(a)(1)(A). We follow Acosta in holding that any disclosure duty that § 404(a)(1)(A) imposes on fiduciaries is limited to the disclosure of information that relates to the provision of benefits or the defrayment of expenses, which are the exclusive purposes for which an ERISA fiduciary may discharge its duties. In focusing on the requestor's asserted purpose, the panel fashioned a subjective test that is unworkable. There is no practical way of limiting the use of the

information, once it is disclosed, to the purpose asserted by the requestor. Indeed, there is no way of assuring that the information will not be used by the requestor for other purposes, or, for that matter, will not be used by third parties who manage to obtain the information once it has been disclosed to a plan participant. In the context of requests under the Freedom of Information Act, the Supreme Court has said that the question of disclosure "cannot turn on the purposes for which the request for information is made." United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771, 109 S.Ct. 1468, 1480, 103 L.Ed.2d 774 (1989). Instead, disclosure "must turn on the nature of the requested document...." Id. at 772, 109 S.Ct. at 1481. The logic of this rule is compelling for two reasons: (1) There is no practical way to restrict a requestor's use of information to the purpose asserted in the request; and (2) there is no practical way of assuring that the information disclosed will not fall into the hands of others. In sum, we accept our Acosta panel's objective test; we reject our Hughes panel's subjective test. We fail to see any basis for distinguishing this case from Acosta. Acosta reasoned that "benefit" refers to "a participant's or beneficiary's right to receive monies from the plan administrator or trustee." Acosta, 950 F.2d at 619. If the right to solicit votes to elect directors who might vote for greater pension benefits is not a "benefit" for purposes of § 404(a)(1)(A), then neither is the right to solicit support for litigation that might result in greater pension benefits. In both Acosta and this case, the requested information about fellow participants does not relate to the provision of benefits or the defrayment of expenses. Accordingly, we hold that § 404(a)(1)(A) does not require a plan administrator to

furnish individual participants with the names and addresses of other participants upon request.[6]

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[6]We are unpersuaded by the Retirees' argument that the common law of trusts imposes a duty in these circumstances on the Plan Administrator to disclose the names and addresses of other participants as beneficiaries of the Plan. The Retirees rely on Acosta, but Acosta merely assumed the existence of such a duty at common law without citing any authority on the issue. See Acosta, 950 F.2d at 619. The other cases relied on by the Retirees also fail to support the proposition that a trustee has a general common law duty to disclose the names and addresses of trust beneficiaries: First, Corum Management Co. v. Aguayo Enters., Inc., 755 S.W.2d 895, 900 (Tex.Ct.App.1988), is a statutory, not a common law, case. The statute required plaintiffs bringing an action against a trustee to notify trust beneficiaries, and mandated disclosure of the beneficiary list to plaintiffs for the purpose of permitting them to fulfill this statutory requirement. In Baydrop v. Second Nat'l Bank, 120 Conn. 322, 180 A. 469 (1935), the court held that beneficiaries of a trust were entitled to the names and addresses of co-beneficiaries only because they needed to obtain the co-beneficiaries' consent in an action to assume control of the trust corpus. Id. 180 A. at 472. Baydrop is thus not relevant to the duties of an ERISA plan fiduciary because no such action is available to ERISA plan participants. In Morris v. Broadview, Inc., 338 Ill.App. 99, 86 N.E.2d 863 (1949) (citing Morris v. Broadview, Inc., 328 Ill.App. 267, 65 N.E.2d 605, 607 (1946)), the court held that beneficiaries in a voting trust were entitled to the names and addresses of their co-beneficiaries to enable them to solicit their co-beneficiaries' votes. Id. 86 N.E.2d at 866. Thus, Morris offers no authority for the imposition of a disclosure duty on the Plan Administrator because the Hughes retirement plan is not a voting trust and Plan participants have no votes to be solicited. In Sobel v. Bess, 49 A.D.2d 591, 373 N.Y.S.2d 513 (1975), the court ordered the defendant, as receiver of certain property from a dissolved partnership, to hold the property in trust and to furnish a list of trust beneficiaries to the plaintiff, as a beneficiary and former general partner. However, the order was reversed on other grounds. Sobel v. Bess, 43 N.Y.2d 969, 404 N.Y.S.2d 595, 595-96, 375 N.E.2d 775, 775-76 (1978). Finally, the Retirees cite George Gleason Bogert, The Law of Trusts and Trustees § 961 (Rev.2d ed. 1983). That treatise adds nothing, however, because it relies solely on Baydrop and Morris. In sum, the Retirees cite no substantial authority for the proposition that the common law imposes a duty on a trustee to disclose names and addresses of

(continued...)

*694 The panel itself failed to identify a meaningful nexus between the information requested by the Retirees and the provision of benefits or defrayment of expenses. It held that the Acosta test was satisfied merely because the disclosure "could help" participants achieve some benefits-related purpose. Hughes, 39 F.3d at 1006. Surely this analysis stretches the Acosta test too far. As a practical matter, participants could always assert that a requested disclosure "could help" them achieve some benefits- related purpose by asserting--as Retirees do here--that the information requested "could help" participants monitor the administration of the plan by a self-appointed watch-dog committee. In any case, since a participant list will not provide the Retirees with any information about the Plan, we fail to see how the list, or the access to other participants that it would facilitate, will aid in monitoring the Plan's management. The Retirees' argument that "[u]nless retirees can communicate with one another and organize to protect their rights under ERISA and under the plan, they will not be able to raise the support needed to enforce their rights against a well-funded pension plan," Appellants' Br. at 15, is unavailing. As this argument makes clear, the Retirees want to use the list to solicit financial support for future litigation. Congress has provided for recovery of costs and attorneys' fees under ERISA § 502(g), 29 U.S.C. § 1132(g), and we find nothing in ERISA suggesting that Congress intended to help plan participants amass a litigation war chest by soliciting donations from other plan participants and beneficiaries. In deciding that § 404(a)(1)(A) does not require disclosure of the names and addresses because they are not related to the provision of benefits, we avoid a question of statutory

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[6](...continued)
beneficiaries to all other beneficiaries, at least in the absence of special circumstances such as voting rights or the need to obtain other beneficiaries' consent to initiate litigation.

construction discussed, but not decided, in Acosta: Whether § 404(a)(1)(A), a general ERISA provision, may be interpreted to require the disclosure of documents that relate to the provision of benefits or the defrayment of expenses but are not documents required to be disclosed under § 104(b)(4), ERISA's specific disclosure provision. In other words, may the general provision be interpreted in a way that expands the requirements of the specific provision? The Acosta panel speculated that a fiduciary's duties under § 404(a)(1)(A) "may in some circumstances extend to additional disclosures" beyond those specified in ERISA § 104.[7] Acosta, 950 F.2d at 618. The Administrator argues that to interpret § 404(a)(1)(A) as requiring the disclosure of documents not required to be disclosed by § 104(b)(4) would effectively "supplant ERISA's existing reporting and disclosure provisions." Pet. for Reh'g at 13. We need not address this question of the relationship between § 104(b)(4) and § 404(a)(1)(A), however, because disclosure of the names and addresses of plan participants is not required by either § 104(b)(4) or § 404(a)(1)(A). The question would arise only if the documents were not disclosable under § 104(b)(4) but were arguably disclosable under § 404(a)(1)(A) because they were related to the provision of benefits or the defrayment of costs. Because we need not decide this question of statutory interpretation, we need not consider the concerns

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[7] The holding of Acosta was that there was no duty to disclose under § 404(a)(1)(A) because the documents did not relate to the provision of benefits or the defrayment of expenses. Acosta, 950 F.2d at 619. It was therefore unnecessary for the Acosta panel to reach the question whether the duties under § 404(a)(1)(A) "may in some circumstances extend to additional disclosures," i.e., to documents that are not § 104(b)(4) documents, but nonetheless relate to the provision of benefits or the defrayment of expenses.

raised by the Administrator and the amici *695 about privacy [8] and costs [9] that would attend the disclosure of names and

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[8]The amici express concern about privacy interests. See Br. of Amicus Curiae Western Conference of Teamsters, at 4-5 (disclosure would expose plan participants to harassment, emotional abuse, and sharp solicitation practices); Br. of Amici Curiae Hughes Aircraft Retirees Ass'n and Hughes Employees Ass'n, at 13-14 (mailing list would become the subject of commercial exploitation, leading to telemarketing calls and other forms of solicitation that amici seek to avoid). The Supreme Court has recognized in the Freedom of Information Act context that individuals have a heightened privacy interest in their home addresses. United States Dep't of Defense v. Federal Labor Relations Auth., — U.S. —, — - —, 114 S.Ct. 1006, 1015-16, 127 L.Ed.2d 325 (1994) ("when we consider that other parties, such as commercial advertisers and solicitors, must have the same access ... to the employee address lists sought in this case, it is clear that the individual privacy interest that would be protected by nondisclosure is far from insignificant") (citation omitted); see also Painting Indus. of Haw. Market Recovery Fund v. USAF, 26 F.3d 1479, 1486 (9th Cir.1994) (Norris, J., concurring) ("The invasion of privacy that results from disclosure of one's home address is far more substantial than, say, the disclosure of one's phone number [because] home addresses are not routinely available."). Moreover, privacy interests "become[ ] more significant ... when names and addresses are combined with ... financial information," such as the fact that the persons are pensioners receiving monthly annuity checks from the same employer. National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 876 (D.C.Cir.1989). "Armed with this information, interested businesses, charities, and individuals could, and undoubtedly would, subject the listed [pensioners] 'to an unwanted barrage of mailings and personal solicitations.' " Id. (citations omitted).

[9] The amici also express concerns regarding administrative costs that a plan could incur if s 404(a)(1)(A) were interpreted to create a fiduciary duty to disclose the names and addresses of plan participants. See Br. of Amicus Curiae Western Conference of Teamsters, at 6-7 (printing a mailing list involves significant costs, which rise substantially when the list requested is a tailored list, e.g., a list of names and addresses of participants who have received benefits under a particular plan provision); Br. of Amici Curiae Hughes Aircraft Retirees Ass'n and Hughes Employees Ass'n, at 14 (when request is made pursuant to general fiduciary duties of s

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addresses of plan participants. Balancing such concerns on the one hand with the policy interests served by disclosure on the other is, of course, best left to Congress--particularly when the conflicting concerns and interests arise in an area of the law Congress has chosen to regulate with painstaking detail. See Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 361, 100 S.Ct. 1723, 1726, 64 L.Ed.2d 354 (1980) (ERISA is a "comprehensive and reticulated statute").

In sum, we hold that ERISA § 404(a)(1)(A) does not require plan administrators to disclose the names and addresses of plan participants to other participants upon request because the disclosure would not provide information that is related to the provision of benefits or the defrayment of expenses.

CONCLUSION

The opinion of the original panel, 39 F.3d 1002, is VACATED, and the judgment of the district court dismissing the action for failure to state a claim under either ERISA § 104(b)(4) or ERISA § 404(a)(1)(A) is AFFIRMED.

PREGERSON, Circuit Judge, joined by HUG, FLETCHER, and REINHARDT, Circuit Judges, dissenting:

The Retirees of the Hughes Non-Bargaining Retirement Plan seek a list of the names and addresses of plan participants for two purposes: (1) to communicate with other plan participants about increasing benefits from the plan's $1 billion of surplus funds, and (2) to create a watchdog committee to ensure that the Administrator properly manages the plan. I dissent on two independent bases: I believe that the

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[9](...continued)
404(a)(1)(A), no provision allows costs to be passed on to requestor).

Administrator has a duty to furnish such a list under ERISA ss 404(a)(1)(A) (the general fiduciary duty provision) and 104(b)(4) (as a plan instrument).

A. ERISA § 404(a)(1)(A)ERISA § 404(a)(1)(A) provides that the Administrator, as a fiduciary to the plan, must discharge his duties of plan administration "solely in the interest of the participants and beneficiaries and--(A) for the exclusive *696 purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan...."In Acosta v. Pacific Enterprises, 950 F.2d 611, 619 (9th Cir.1991), we held that a plan administrator did not have a duty to disclose a list of participants' shareholdings because "there is not a sufficient nexus between ... the list ... for the purpose of soliciting votes and the provision of benefits or defrayment of expenses." We explained that the term "benefit" refers to a participant's right to receive monies from the plan administrator, not the right to vote in an election for corporate officers. Id. The purpose for which the Retirees seek the mailing list is directly related to their right to receive monies from the plan Administrator. The list will enable the Retirees to communicate with other plan participants about increasing benefits from the plan's surplus funds of more than $1 billion, and to create a watchdog committee to ensure that the Administrator properly manages the plan. The majority opinion misreads Acosta as requiring a nexus between the disclosure requested and the provision of benefits. In Acosta, we made clear that the disclosure of the list could have been required if the purpose for which the list would be used was sufficiently related to the provision of benefits. Id. ("[T]here is not a sufficient nexus between ... [the] list ... for the purpose of soliciting votes in a proxy contest and the provision of benefits...."). Following Acosta, the original panel narrowly limited its holding by emphasizing that administrators do not have a fiduciary duty to disclose a list of plan participant names

and addresses "as a matter of course in every case." Hughes v. Administrator, 39 F.3d 1002, 1007 (9th Cir.1995).The majority opinion notes that in the context of disclosure requests under the Freedom of Information Act, the Supreme Court in United States Dep't of Justice v. Reporters Committee, 489 U.S. 749, 771, 109 S.Ct. 1468, 1480, 103 L.Ed.2d 774 (1989), stated that disclosure "cannot turn on the purposes for which the request for information is made." But in Reporters Committee, the Court went on to say that whether disclosure was warranted "must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny." Id. at 772, 109 S.Ct. at 1481. See also United States Dep't of Defense v. Federal Labor Relations Authority, --- U.S. ----, ----, 114 S.Ct. 1006, 1013, 127 L.Ed.2d 325 (1994) (disclosure of employees' home addresses would not appreciably further "the citizens' right to be informed about what their government is up to").[1]

In the instant case, the disclosure of the list of plan participants would directly advance the very purposes Congress had in mind when it enacted ERISA's disclosure provisions. Section 404(a)(1)(A) requires a fiduciary to furnish all information to the extent that the request "relate[s] to" the provision of benefits, and § 104(b)(4) requires a fiduciary to furnish all "plan instruments." As discussed above, Congress intended for these disclosure provisions to help beneficiaries secure benefits to

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[1] In any event, Reporters Committee and other FOIA cases are of limited guidance because FOIA, which requires full agency disclosure, is limited by an exemption clause: disclosure is not required if it would constitute "a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). ERISA contains no such limitation on the fiduciary's duty to disclose plan instruments or documents that relate to the provision of benefits.

which they may be entitled, and to enable them to better police the administration of their plan.[2]

Finally, the majority opinion is based on an unfounded fear of the list falling into "the wrong hands." The majority opinion states that there is no practical way to restrict a requestor's use of information to the purpose asserted, and that there is no practical way of preventing third parties from exploiting the list for commercial or other improper purposes. There are at least three ways to protect the list. First, the Administrator can prevent the Retirees from misusing the list by requesting the court to issue an appropriate protective order. Second, the Administrator can prevent the list from falling into the wrong hands by doing the mailing for and at the expense of the Retirees. Third, the Administrator can prohibit improper use of the list as one of the terms of the plan, and then use the Administrator's powers to enforce the prohibition under ERISA § 502(a)(3) (fiduciary may enjoin any act or practice which violates terms of plan).Invasion

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[2] In Acosta we noted that:

ERISA's legislative history demonstrates that "Congress invoked the common law of trusts to define the general scope of [a fiduciary's] authority and responsibility." The language of section 404(a) reflects this congressional intent that common law trust principles animate the fiduciary responsibility provisions of ERISA. Acosta, 950 F.2d at 618 (citations omitted). Thus, I refer to the general law of trusts to conclude that the ERISA administrator has a duty to make available the names and addresses of beneficiaries to all other beneficiaries. See George Gleason Bogert, The Law of Trusts and Trustees § 961 (Rev.2d ed. 1983). The majority opinion quickly distinguishes some of the cases that undergird the common law principle that trustees must provide beneficiaries with the information necessary to police the trust. Following its brief survey of the common law of trusts, the majority concludes that the common law only requires disclosure under "special circumstances." I believe the majority avoids the critical question: Does such a special circumstance exist when ERISA beneficiaries seek to police the trust? Given the unequivocal legislative history on this issue, I believe it does.

of privacy need not be an issue here, but for the Administrator's unwillingness to cooperate with the Retirees. The Retirees informed the Administrator that the list need not be turned over to them, and that they would pay any expenses that the Administrator incurred to mail the necessary information to the plan participants. This offer the Administrator rejected.

B. ERISA § 104(b)(4)The majority opinion concludes that a list of the names and addresses of plan beneficiaries does not qualify as a "plan instrument" under ERISA § 104(b)(4). The majority opinion reasons that the disclosure duties of the Administrator extend only to those documents specifically enumerated in § 104(b)(4), and other documents that are similar to those listed in that section. But as the original panel found, neither the statutory text nor the legislative history of § 104(b)(4) support such a narrow construction of the term "plan instrument." Hughes, 39 F.3d at 1008. Indeed, both the text and legislative history indicate that Congress contemplated "plan instrument" to include the kind of list that the Retirees seek. Section 104(b)(4) requires the disclosure of "other instruments under which the plan is established or operated." The mailing list is necessarily an instrument under which the plan is operated because without it, an administrator could not possibly pay benefits or keep plan participants informed of plan administration. The purpose for which the Retirees seek the list, to police the administration of the plan, is precisely one of the reasons why Congress enacted § 104(b)(4). The Senate Committee on Labor and Public Welfare explained that the disclosure requirements were intended to improve the quality of information participants receive about the operation of their plan, and thus enable them to better police the plan: Disclosure ... impart[s] to employees sufficient information and data to enable them to know whether the plan [i]s financially sound and being administered as intended .... [T]he information disclosed would enable employees to police

their plans.... [There is] a need for more particularized form of reporting so that the individual participant knows exactly where he stands with respect to the plan--what benefits he may be entitled to .... [T]he fiduciary responsibility section will operate efficiently only if fiduciaries are aware that ... their dealings will be open to inspection and the ... beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general. S.Rep. No. 127, 93d Cong., 2d Sess. (1973), reprinted in, 1974 U.S.C.C.A.N. 4838, 4863 (emphasis added).The majority opinion argues that the test articulated by the original panel--whether a document is critical to the operation of the plan--"admits of no limiting principle." The *698 majority opinion incorrectly hypothesizes that documents such as medical histories and wage records would be subject to disclosure because those documents are necessary to the operation of an ERISA plan. However, medical histories and wage records would not qualify as a plan instrument because they do not in any way serve the purposes for which Congress enacted § 104(b)(4): to enable beneficiaries to enforce their rights and police the administration of the plan. Thus, contrary to the majority opinion's assertion, the test established by the original panel is narrowly circumscribed by the additional criterion of whether the document is crucial to the enforcement of plan benefits. The majority opinion also relies on Curtiss-Wright Corp. v. Schoonejongen, --- U.S. ----, ----, 115 S.Ct. 1223, 1231, 131 L.Ed.2d 94 (1995), for the proposition that § 104(b)(4) only requires the disclosure of "governing plan documents," and that a mailing list clearly does not fall in this category. Curtiss-Wright involved the adequacy of a company's procedure for amending its employee benefit plan. The Supreme Court did not rule in any way on the question presented in the instant appeal, which involves the disclosure requirements of an ERISA fiduciary. To the extent that the Court discussed § 104(b)(4), it did so only to make its point that

because § 104(b)(4) would require the disclosure of any new amendments to the plan, it obviated the need for a separate notice requirement. Moreover, although the Court characterized the documents to be disclosed under § 104(b)(4) as "governing plan documents," it did not define what constituted such documents, but only decided that a new amendment to the plan was a governing plan document.

CONCLUSION

The holding of the original panel is narrow and tailored to its particular facts. Congress intended for both ERISA ss 404(a)(1)(A) and 104(b)(4) to equip beneficiaries with the necessary information to enforce their rights, particularly in securing benefits to which they may be entitled. The list of plan participants unquestionably effectuates these objectives in the circumstances of this case. Accordingly, I dissent.

(CITE AS: 53 F.3D 1090)

HUGHES SALARIED RETIREES ACTION COMMITTEE; Peter Formo; Richard E. Miller;

Norman C. Rigby, Plaintiffs-Appellants,

v.

ADMINISTRATOR OF the HUGHES NON-BARGAINING RETIREMENT PLAN, Defendant-Appellee.

No. 93-55384.

United States Court of Appeals,

Ninth Circuit.

May 19, 1995.Prior report: 9th Cir., 39 F.3d 1002.

ORDER

WALLACE, Chief Judge. Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3.

(CITE AS: 39 F.3D 1002)

HUGHES SALARIED RETIREES ACTION COMMITTEE; Peter FORMO; Richard E. Miller;

Norman C. Rigby, Plaintiffs-Appellants,

v. ADMINISTRATOR OF the HUGHES NON-BARGAINING RETIREMENT PLAN, Defendant-Appellee.

No. 93-55384.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted Nov. 4, 1993.

Decided Nov. 7, 1994.

As Modified Feb. 13, 1995. Individual retirees, and committee formed to communicate with Employee Retirement Income Security Act (ERISA) participants about their rights under employer's ERISA plan, brought action against plan administrator for alleged breach of fiduciary duties and violation of disclosure requirements. The United States District Court for the Central District of California, Richard A. Gadbois, Jr., J., dismissed complaint for failure to state claim. Retirees and committee appealed. The Court of Appeals, Pregerson, Circuit Judge, held that: (1) administrator violated ERISA section requiring administrator to discharge duties in interest of participants and beneficiaries when administrator failed to disclose to retirees the names and addresses of other plan participants; (2) administrator's failure to supply retirees with

plan participant list violated ERISA section requiring administrator, upon written request, to furnish copy of "other instruments under which the plan is established or operated"; (3) administrator did not violate section of plan authorizing him to impose reasonable charge to cover cost of furnishing documents to participants when he failed to supply retirees with plan participant list; and (4) retirees were entitled to legal fees on appeal.Affirmed in part; reversed and remanded in part.Norris, Circuit Judge, dissented and filed opinion.*1004 Seth Kupferberg, Sipser, Weinstock, Harper & Dorn, New York City, for plaintiffs-appellants. Robert F. Walker, Paul, Hastings, Janofsky & Walker, Santa Monica, CA, for defendant-appellee. Appeal from the United States District Court for the Central District of California.

Before: FLETCHER, PREGERSON, and NORRIS, Circuit Judges.

Opinion by Judge PREGERSON; Dissent by Judge NORRIS.
PREGERSON, Circuit Judge: The Hughes Salaried Retirees Action Committee (the "Committee") and three individual participants in the Hughes Non-Bargaining Retirement Plan (the "Plan") [collectively the "Retirees"] brought an action under § 502 of the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132, against the Plan administrator (the Administration). The Retirees alleged that the Administrator breached his fiduciary duties and violated ERISA disclosure requirements when he refused to provide them with a list of the names and addresses of Plan participants. The district court dismissed the Retirees' complaint for failure to state a claim and denied the Administrator's request for attorneys' fees. We have jurisdiction under 28 U.S.C. § 1291. We affirm in part and reverse and remand in part.

BACKGROUND

[1] The Committee was formed for the purpose of communicating with Plan participants and beneficiaries about their rights under the Plan and Hughes Aircraft's failure to use surplus Plan assets to increase benefits. In April 1990, the Committee wrote to the Administrator to request a list of Plan participants' names and addresses. By letter, the Administrator denied the request.[1]

*1005 The Retirees then filed an action under ERISA for breach of fiduciary duty and enforcement of their right to disclosure of the names and addresses of Plan participants. The Retirees want to use the list to inform Plan participants and beneficiaries about Hughes' allegedly improper use of the Plan's approximately $1 billion in surplus assets,[2] and to gain support for future efforts to negotiate with Hughes or litigate to create increased Plan benefits using the surplus assets. The Retirees also intend to use the list to form a watchdog committee to assure that the Plan is properly managed. The Retirees contend that, under these circumstances, the Administrator's refusal to supply the names and addresses amounted to a breach of his fiduciary duty of care, ERISA § 404(a)(1)(A); violated the requirement that an administrator provide participants and beneficiaries with certain plan documents, ERISA § 104(b)(4); and violated the Administrator's fiduciary duty to manage the Plan in accordance with its terms, ERISA § 404(a)(1)(D).

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[1] Because this is an appeal from a dismissal under Fed.R.Civ.P. 12(b)(6), we accept the facts alleged in the complaint as true. Love v. United States, 915 F.2d 1242, 1245 (9th Cir.1989).

[2] A related appeal, Jacobson v. Hughes Aircraft Co., No. 93-55392, concerns the merits of Hughes' alleged improper use of surplus assets.

[2] In December 1992, the Administrator moved to dismiss the Retirees' amended complaint for failure to state a claim upon which relief can be granted, Fed.R.Civ.P. 12(b)(6). The district court granted the Administrator's motion. The Retirees timely appeal.[3]

ANALYSIS

[3] We review de novo the district court's dismissal of the Retirees' complaint under Fed.R.Civ.P. 12(b)(6). Oscar v. University Students Co- operative Ass'n, 965 F.2d 783, 785 (9th Cir.) (en banc), cert. denied, --- U.S. ----, 113 S.Ct. 655, 121 L.Ed.2d 581 (1992).I. Non-Disclosure as Violation of ERISA § 404(a)(1)(A)[4][5] The Retirees allege that the Administrator's refusal to provide the requested list of names and addresses violated ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A). That section provides that the Administrator, as fiduciary to the Plan,[4] [FN4] must discharge his duties of plan administration "solely in the interest of the participants and beneficiaries and--(A) for the exclusive purpose of: (i) providing benefits to

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[3]The Retirees filed notice of appeal on March 1, 1993. We reject the Administrator's contention that this appeal is untimely because it was filed more than 30 days from the district court's entry of the Civil Minutes on January 20, 1993. In fact, the appeal is timely because the notice of appeal was filed within 30 days of the entry of judgment on February 10, 1993. See Fed.R.App.P. 4(a)(1) ("In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from...."); Vernon v. Heckler, 811 F.2d 1274, 1276 (9th Cir.1987) (explaining that until the judgment is set forth on a separate document, the period for filing notice of appeal is tolled).

[4]The Administrator does not challenge the Retirees' allegation that he was a fiduciary to the Plan.

participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan...." ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A).[5]

[6][7] We interpret the fiduciary duties under ERISA by " 'bearing in mind the special nature and purposes of employee benefit plans intended to be effectuated by [ERISA].' " Acosta v. Pacific Enterprises, 950 F.2d 611, 618 (9th Cir.1991) (quoting H.R.Rep. No. 533, 93d Cong., 2nd Sess. (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4650). The fiduciary duties help ensure that employee plan participants and beneficiaries are equipped to safeguard their rights. *1006 Disclosure has been seen as a device to impart to employees sufficient information and data to enable them to know whether the plan [is] financially sound and being administered as intended. It [is] expected that the information disclosed [will] enable employees to police their plans.... [T]he safeguarding effect of the fiduciary responsibility section will operate efficiently only if fiduciaries are aware that the details of their dealings will be open to inspection, and that individual participants and beneficiaries will be armed with enough information to enforce their own rights....1974 U.S.C.C.A.N. at 4649 (emphasis added); United States v. Sarault, 840 F.2d 1479, 1484 (9th Cir.1988) (Congress enacted ERISA to enable retirees to police their own plans and receive the information needed to do so). Therefore, based on ERISA § 404(a), the Administrator's disclosure duty "may in some circumstances

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[5]The Retirees also allege that the Administrator violated ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B), which requires a fiduciary to discharge the duties of plan administration "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims...." We do not address this claim because neither the district court's order nor the parties' briefs address it.

extend to additional disclosures [beyond the requirements of ERISA ss 101-11, 29 U.S.C. ss 1021-31] where the interests of the beneficiaries so require." Acosta, 950 F.2d at 618 (emphasis added).[8][9][10][11] The Administrator's disclosure duty based on ERISA § 404(a) derives from common law trust duties of a fiduciary. Id. A fiduciary's common law duties include a duty to furnish to each beneficiary all information that she needs to enforce her rights under the trust. Restatement (Second) of Trusts § 173. A trust beneficiary is entitled to a list of the names of beneficiaries so that she can communicate with them for mutual aid and protection. This right of a trust beneficiary to know the identity of fellow beneficiaries creates a duty in the trustee to provide the information upon demand. See George Gleason Bogert, 46 The Law of Trusts and Trustees, Rev. 2nd Ed. § 961, p. 8 (1978).[12] ERISA § 404(a) incorporates the common law trust duties regarding disclosure "to the extent that they relate to the provision of benefits or the defrayment of expenses, and only insofar as they do not contradict or supplant the existing reporting and disclosure provisions." Acosta, 950 F.2d at 618.[6] In this case, as in Acosta, we focus on the relationship of a disclosure duty "to the provision of benefits." In Acosta, a plan participant demanded a list of plan participant names, addresses, and shareholdings, to solicit votes for an election of corporate directors. We found no fiduciary disclosure duty because there was an insufficient nexus between the provision of benefits and the request. "The term 'benefit' refers to a participant's or beneficiary's right to receive monies from the plan administrator ..., not the right to vote in an election for corporate officers." Id. See also In re Sears, Roebuck and Co. Secs. Litig., 792 F.Supp. 977, 983-84 (E.D.Pa.1992)

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[6]. The Administrator concedes that a disclosure duty covering the participant mailing list would not contradict or supplant the existing ERISA reporting and disclosure provisions.

(following Acosta, and finding no fiduciary duty to pay costs of mailing a board candidate's proxy statement to plan participants).

In Acosta, we did not hold that plan participants may never obtain a list of participants' names and addresses; we held only that the solicitation of votes for corporate directors is not related to the provision of plan benefits. The present case is distinguishable from the vote solicitation in Acosta.The Retirees requested the participant list for two purposes: (1) to communicate with other Plan participants and beneficiaries about increasing benefits from the Plan's surplus funds; and (2) to create a watchdog committee to ensure that the Administrator properly manages the Plan. Both of these purposes relate to the Administrator's duty to provide benefits: The Retirees' underlying purpose in both instances is to ensure that Plan participants are receiving and continue to receive benefits to which they are entitled under the Plan, including increased benefits from the Plan's surplus assets. Access to the list could help the Retirees to secure what they perceive to be their rights under the Plan. This connection between the requested list and the "provision of benefits" satisfies our test in Acosta. Therefore, the Administrator had a fiduciary duty to disclose the list.

[13][14] The district court incorrectly concluded otherwise because it focused on *1007 the information the list provides rather than the Retirees' purpose for seeking it. (District Court Order at 6) ("[O]ther plan participants have no information about the payment of benefits, while the Administrator does. [The Retirees] do not, then, seek information about the provision of benefits...."). Acosta requires us to focus on the Retirees' purpose for seeking the list. See Acosta, 950 F.2d at 619. Only the Retirees' purpose for wanting the list, not the list itself, must relate to the provision of benefits. Under Acosta, the

Administrator had a fiduciary duty to disclose the list. The district court erred in concluding otherwise. [7]

[15] By this opinion, we do not imply that administrators have a fiduciary duty to disclose a list of plan participant names and addresses as a matter of course in every case. The fiduciary disclosure duty applies only when, as in this case, a plan participant or beneficiary intends to use the demanded list to enforce her rights under an ERISA plan or to monitor the administrator's management of plan assets in accordance with ERISA requirements. Communicating with fellow Plan participants for these purposes "relates to the provision of benefits." Were we to deny reasonable demands by plan participants and beneficiaries for information that can aid them in enforcing their rights to ERISA-protected benefits, we would ignore congressional intent, discussed supra, to arm employees with sufficient information to protect their interests. Therefore, we reverse dismissal of the Retirees' claim under § 404(a)(1)(A).II. Non-Disclosure as Violation of ERISA §

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[7] The district court also based its ruling on its finding that the Retirees' amended complaint alleged no facts that would establish an entitlement to the Plan's surplus assets. (District Court Order at 6). The court concluded that the Retirees "have no right to force the Administrator to disclose information about [surplus assets] to which they are not entitled." Id. For purposes of this appeal, we need not address the merits of the Retirees' claim to the surplus Plan assets. We note, however, that plan participants and beneficiaries are not required to establish an entitlement to specific benefits in order to trigger the fiduciary disclosure duty. Plan participants and beneficiaries are entitled to receive mailing lists (assuming the Acosta test is met) without establishing a right to unpaid benefits. At the stage where disclosure is sought, the merits of the lawsuit have simply not been sufficiently well developed to permit the district court to determine whether or not the requesters have established that they are entitled to additional benefits. However, so long as the requesters have established the requisite nexus between disclosure and the claim to provision of additional benefits, the Administrator's disclosure duties are triggered.

104(b)(4)[16] As a second cause of action, the Retirees allege that the Administrator's failure to supply the Plan participant list violated the disclosure requirement of ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4). That section provides: The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make reasonable charge to cover the cost of furnishing such complete copies. ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4) (emphasis added). The Retirees argue that the requested list of participant names and addresses is one of the "other instruments under which the plan is ... operated," id., because the list is essential to operating the Plan. We agree with the Retirees and hold that a mailing list of plan participants (or beneficiaries) is an "instrument[ ] under which [a] plan is ... operated" within the meaning of ERISA § 104(b)(4). The mailing list is critical to the operation of a plan because without it an administrator could not possibly pay benefits or keep plan participants informed of plan administration. Compare Werner v. Morgan Equip. Co., 15 Employee Benefits Cas. 2295, 1992 WL 453355, at *6 (N.D.Cal.1992) (valuation reports are within ERISA § 104(b)(4) because they are used to "carry out" the determination of benefits, which is "a regular, required and necessary function of the operation of the [plan]") and Lee v. Dayton Power and Light Co., 604 F.Supp. *1008 987, 1002 (S.D.Ohio 1985) (a manual containing charts essential to the calculation of benefits is an "underlying plan document" and therefore, an instrument under which the plan is established or operated) with Chambless v. Masters, Mates & Pilots Pension Plan, 571 F.Supp. 1430, 1456-57 (S.D.N.Y.1983) (minutes of trustee meetings and decisions are not within ERISA § 104(b)(4)).[17] The Administrator urges us to limit the broad statutory language:

"instruments under which the plan is established or operated." In much the same vein, the district court, in dismissing the Retirees' claim, explained that ERISA § 104(b)(4) limits the universe of "other instruments" to those documents that are similar to documents specifically listed in that section. The district court stated that § 104(b)(4) requires the Administrator to disclose only those documents that describe the terms and conditions of the Plan or its administration and financial status. The court contrasted such documents with the mailing list that the Retirees seek because the list would provide the Retirees with no information about the Plan. The language of § 104(b)(4), however, contains no such limitation, and we have found no other authority for limiting the statutory language this

way.[8] Therefore, we reverse the dismissal of the Retirees' claim

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[8] The Administrator refers us to Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740, 105 S.Ct. 2380, 2389, 85 L.Ed.2d 728 (1985), which cautions that construction of ERISA provisions "must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose" (internal quotations omitted). Metropolitan Life, however, does not support the Administrator's position. The language of the statute does not contain the limitation the Administrator urges us to adopt, and the legislative history of ERISA s 104(b)(4) simply confirms that the plain meaning of the statute is the meaning which Congress intended. The relevant history indicates that Congress created the ERISA s 104(b)(4) disclosure requirements to improve the quality of information participants receive about operation of their plan, and thus enable them to better police the plan. The Committee on Labor and Public Welfare explained as follows: The underlying theory of the Welfare and Pension Plans Disclosure Act to date has been that reporting of generalized information concerning plan operations to plan participants and beneficiaries to the public in general would ... insure that the plan would be operated according to instructions and in the best interests of participants and beneficiaries. The Secretary's role in this scheme was minimal. Disclosure has been seen as a device to impart to employees sufficient information and data to enable them to know whether the plan was financially sound and being administered as intended. It was expected that the information disclosed would enable employees to police their plans. But experience has shown that the limited data available under the present Act is insufficient. Changes are therefore required to increase the information and data required in the reports both in scope and detail. Experience has also demonstrated a need for a more particularized form of reporting so that the individual participant knows exactly where he stands with respect to the plan--what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, what procedures he must follow to obtain benefits, and who are the persons to whom the management and investment of his plan funds have been entrusted. At the same time the safeguarding effect of the fiduciary responsibility section will operate efficiently only if fiduciaries are aware that the details of their dealings will be open to inspection and the individual participants and beneficiaries will be armed with enough information to enforce their own rights as well the obligations owed by fiduciary to the plan in general. S.Rep. No. 127, 93rd Cong., 2d Sess. (1973), reprinted in 1974

(continued...)

under § 104(b)(4).

III. Violation of the Plan's Terms as Fiduciary Breach[18][19] The Retirees' third claim is that the Administrator breached his fiduciary duty under ERISA § 404(a)(1)(D) [9] by violating Art. V § 5.1(g) of the Plan, which authorizes the Administrator to impose a reasonable charge to cover the cost of furnishing documents to participants and beneficiaries upon their written request pursuant to ERISA § 104(b)(4). We affirm the district *1009 court's dismissal of this claim. The Administrator did not violate the Plan provision that allows him to charge the Retirees for copies of documents because he has not yet disclosed the documents. Nor do we see how this provision creates any substantive rights for the Retirees. [10]

IV. Attorneys' Fees on Appeal[20][21] The Retirees seek attorneys' fees on appeal under ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1). ERISA § 502(g)(1) provides, in relevant part: "In any action under this subchapter ... by a participant, beneficiary,

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[8](...continued)
U.S.C.C.A.N. 4838, 4863 (emphasis added).

[9] ERISA s 404(a)(1)(D) provides as follows:
A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and ... in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter. 29 U.S.C. s 1104(a)(1)(D).

[10] The Retirees also allege that the Administrator breached his fiduciary duty by violating Article V s 5.2 of the Plan. That section states that the "Plan shall be administered, interpreted and applied fairly and equitably and in accordance with the specified purpose of the Plan." We read the Retirees' failure to address Article V s 5.2 on appeal to mean that they do not appeal the district court's dismissal of this claim.

or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." To determine whether to award attorneys' fees under ERISA § 502(g)(1) a court should consider: (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions. Franklin v. Thornton, 983 F.2d 939, 943 (9th Cir.1993) (quoting Hummell v. S.E. Rykoff & Co., 634 F.2d 446, 453 (9th Cir.1980)). The Retirees sought to resolve a significant legal question regarding ERISA, they sought to benefit all Plan participants, and their position is meritorious. For these reasons, we grant their request for attorneys' fees on appeal.

AFFIRMED in part; REVERSED AND REMANDED in part.

WILLIAM A. NORRIS, Circuit Judge, dissenting. In Acosta v. Pacific Enterprises, 950 F.2d 611 (9th Cir.1991), as amended on reh'g (9th Cir.1992), the plaintiff, a participant in a Pacific Enterprises' pension plan, requested that the plan trustee provide him with a list of the names, addresses, and voting shares of Pacific Enterprises' stock held by each plan participant so that he could solicit votes in a board of directors election. We rejected Acosta's claim that ERISA required a fiduciary to disclose the list because such information was not "sufficiently related to the provision of benefits or the defrayment of expenses." [1] Id. at

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[1] We made clear that the term "benefit" refers only "to a participant's or beneficiary's right to receive monies from the plan administrator or trustee." 950 F.2d at 619. (footnote omitted).

(continued...)

619. We held that "common law trust duties regarding the disclosure of information to beneficiaries may be read into ERISA ... only to the extent that they relate to the provision of benefits or the defrayment of expenses."[2] Id. at 618. Under Acosta, therefore, ERISA does not mandate disclosure unless there is a sufficient nexus between the information requested and the provision of benefits or the defrayment of expenses.

In what I believe is a misreading of Acosta, the majority reverses the district court, holding that ERISA requires the Hughes administrator to disclose the names and addresses of the participants because plaintiffs' asserted purpose for the request concerns the provision of benefits. In doing so, the majority, citing no authority, shifts from the objective standard of Acosta (the nature of the document requested) to a subjective standard (the alleged intent of the requestors). In the context of requests under the Freedom of Information Act, the Supreme Court has held that the question of disclosure "cannot turn on the purposes for which the request for information is made." United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 771, 109 S.Ct. 1468, 1480, 103 L.Ed.2d

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[1](...continued)

[2] Even if, as the majority asserts, plaintiffs' request would be granted under the common law of trusts, Acosta limits the applicability of that law by requiring a nexus between the information and benefits. agree with the well-reasoned decision of the district court in this case. Following Acosta, the district court held that the Administrator is under no obligation to disclose the names and addresses of all 60,000 plan participants in the Hughes pension plan because such a list provides no information or access to information about the provision of benefits or the defrayment of expenses under the plan. Indeed, plaintiffs do not request the list to gain this kind of information. Rather, they wish to gain access to other participants to help them "police" the administration *1010 of the plan and to rally support for efforts to obtain an increase in benefits.

774 (1989). Instead, disclosure "must turn on the nature of the requested document" because disclosure of personal information constitutes an "invasion of privacy." Reporters Committee, 489 U.S. at 772, 771, 109 S.Ct. at 1481, 1480.The majority ignores the privacy interests at stake in ordering Hughes to disclose the participants' names and addresses. If disclosed to one group of participants, presumably the list must be disclosed to any other group of participants asserting that they too want to garner support for increased benefits. And once any group of participants has the list, there is no assurance that it will not fall into the hands of others who will exploit it for their own commercial purposes. In this case, the list will include over 60,000 Hughes employees' names and addresses, making it a list of considerable commercial value. In other words, there is no reason to believe there is not a "substantial probability that the disclosure will lead to the use of the list by marketers and a concomitant invasion of the workers' right to be let alone." Painting Industry of Hawaii Market Recovery Fund v. United States Air Force, 26 F.3d 1479, 1483 (9th Cir.1994) (citations omitted). See also id. at 1486 (Norris, J., concurring) ("The invasion of privacy that results from disclosure of one's home address is far more substantial than, say, the disclosure of one's phone number [because] home addresses are not routinely available."); United States Department of Defense v. Federal Labor Relations Authority, --- U.S. ----, ---- - ---- 114 S.Ct. 1006, 1015-16, 127 L.Ed.2d 325 (1994) ("when we consider that other parties, such as commercial advertisers and solicitors, must have the same access ... to the employee address lists sought in this case, [ ] it is clear that the individual privacy interest that would be protected by nondisclosure is far from insignificant.") (citations omitted).In addition to ignoring the privacy interests of the participants, the majority ignores the administrative costs of disclosing lists to any group of participants who ask for them for the asserted purpose of trying to rally support for increased benefits. Administrative costs, of

course, are paid out of plan assets. The majority holds, in the alternative, that ERISA mandates the disclosure of the list of names and addresses because it is one of the "other instruments under which the plan is established or operated." 29 U.S.C. § 1024(b)(4) (1985).[3] As the district court held, ERISA implicitly limits "other instruments" to those documents that are similar to the documents specifically listed in that section. For example, upon request, an administrator must provide a participant with a copy of the plan description, the latest annual report, any terminal report, the bargaining agreement, or trust agreement. See 29 U.S.C. § 1024(b)(4). These documents all provide participants with direct information about the plan and its benefits. The requested mailing list, in contrast, provides no information about the plan or its benefits. Cf. Lee v. Dayton Power and Light Co., 604 F.Supp. 987, 1002 (S.D.Ohio 1985) (holding that a manual containing charts essential to *1011 the calculation of benefits is an instrument under which the plan was established or operated). It is an unwarranted expansion of the meaning of "other instruments" to interpret it to include the names and addresses of plan participants.

I respectfully dissent.

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[3]This section of ERISA provides: "The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated." 29 U.S.C. § 1024(b)(4).

UNPUBLISHED DISPOSITION
(CITE AS: 978 F.2D 1265, 1992 WL 332117 (9TH CIR.(CAL.)))

NOTICE: Ninth Circuit Rule 36-3 provides that dispositions other

than opinions or orders designated for publication are not precedential and should not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.

(The decision of the Court is referenced in a "Table of Decisions

Without Reported Opinions" appearing in the Federal Reporter.)

HUGHES SALARIED RETIREES ACTION COMMITTEE; Peter Formo; Richard E. Miller; Normal C. Rigby,

Plaintiffs-Appellants,

v.

ADMINISTRATION OF the HUGHES NON-BARGAINING RETIREMENT PLAN,

Defendant- Appellee.

No. 91-55840.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Oct. 9, 1992.

Decided Nov. 10, 1992.

Appeal from the United States District Court for the Central District of California, No. CV-91-0335-RG; Richard A. Gadbois, Jr., District Judge, Presiding. C.D.Cal.

APPEAL DISMISSED.

Before POOLE, FERNANDEZ and T.G. NELSON, Circuit Judges.

ORDER

At oral argument, the panel suggested there might be no final order. Counsel said the district court made it clear at the hearing that the dismissal was to be with prejudice.

The district court's instructions to counsel at the hearing on the motion were to "submit a proposed court order for my editing that states fully the reasons for this."

In editing the ten-page proposed order, the district court struck out language saying the complaint was dismissed in its entirety "without leave to amend."It also struck an entire paragraph which said, in part, that the defects in the pleading could not be cured by amendment. The court also struck language denying the cross-motion for summary judgment as moot. Language was substituted which "deemed" the cross-motion moot and taking it off calendar. The order of dismissal also speaks to dismissal of the complaint, but not the action.

While this court will consider an order of dismissal to be final if it appears that the district court intended to dismiss the action (see Hoohuli v.Ariyoshi, 741 F.2d 1169, 1171 n. 1 (9th Cir.1984)), that is not the situation here. The form of the order, the lack of a separate judgment as required by Rule 58,

Fed.R.Civ.P. and the specific language edited out and added by the district court lead us to conclude there is no final decision of the district court, without which we have no jurisdiction. 28 U.S.C. s 1291.

APPEAL DISMISSED.

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

HUGHES SALARIED RETIREES ACTION COMMITTEE, PETER FORMO, RICHARD E. MILLER and NORMAN C. RIGBY, Individually and as Members,

Plaintiffs,

vs.

ADMINISTRATOR OF THE HUGHES NON-BARGAINING RETIREMENT PLAN,

Defendant.

CASE NO. CV 91-0335-RG (Bx)

JUDGMENT

Defendant Administrator of the Hughes Non-Bargaining Retirement Plan's motion to dismiss plaintiffs'

amended complaint pursuant to Fed. R. Civ. Proc. 12(b)(6) came on for consideration by the Honorable Richard A. Gadbois, Jr., United States District Judge. The Court having duly reviewed the papers submitted by both the moving and the opposing parties, and an order of dismissal of action having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiffs take nothing by their amended complaint, that the entire action be dismissed on the merits with prejudice.

DATED: February 9, 1993

RICHARD A. GADBOIS, JR.
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

HUGHES SALARIED RETIREES ACTION COMMITTEE, PETER FORMO, RICHARD E. MILLER and NORMAN C. RIGBY, Individually and as Members, Plaintiffs, vs. ADMINISTRATOR OF THE HUGHES NON-BARGAINING RETIREMENT PLAN, Defendant.	CASE NO. CV 91-0335-RG (Bx) ORDER OF DISMISSAL OF ACTION

This cause was scheduled for hearing on January 25, 1993, before the Honorable Richard A. Gadbois, Jr., United States District Judge, on defendant Administrator of the Hughes Non-Bargaining Retirement Plan's ("Plan Administrator") renewed motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. The Court, having reviewed the papers submitted by the moving and opposing parties, and having concluded that defendant Plan Administrator's renewed motion to dismiss should be granted, has taken the motion off the Court's hearing calendar and now finds as follows:

1. This action arises under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1001, et seq. Plaintiffs include individual participants in the Hughes Non-Bargaining Retirement Plan (the "Plan"), and an organization named the Hughes Salaried Retirees Action Committee, alleged to be made up of Plan participants.

2. Defendant in this action is the Administrator of the Plan.

3. The original complaint purported to state three causes of action, each alleging that the Plan Administrator violated various provisions of ERISA when it declined a request from one or more of the plaintiffs that it furnish a list of the Plan participants' names and addresses. Plaintiffs alleged that the Plan Administrator is obligated to provide such information so that Plan participants may communicate with each other and form a"watchdog committee" on matters relating to the Plan. Plaintiffs did not, however, allege that the Plan had failed to provide any benefits due under the Plan. Rather, plaintiffs stated that they sought the list "to gain support for their efforts to

obtain increased benefits through negotiation or if required, litigation . . ." (Complaint ¶ 10.)

4. In early 1991 the Plan Administrator moved to dismiss the original complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and, on July 10, 1991, this Court entered an order dismissing the complaint in its entirety, but did not dismiss the action or enter the proposed judgment. In that order this Court expressly found that plaintiffs' request for information did not relate to the "provision of benefits or defrayment of expenses," the test for providing such information subsequently adopted in Acosta v. Pacific Enterprises, 950 F.2d 611, 618 (9th Cir. 1991). That 1991 Order provided:

> Moreover, whatever the precise duties of plan fiduciaries under Section 1104(a), those duties relate to and are limited to the obligations to provide benefits to plan participants and beneficiaries, to defray reasonable expenses in administering the plan, and to act with the requisite care and skill in conducting the affairs of employee benefit plans. The purported duty to furnish participant lists upon request is not related to any of those purposes.
>
> . . . .

(July 1991 Order, p. 5, ¶ 9.)

5. Plaintiffs did not attempt to amend their complaint, but instead appealed the July 1991 Order to the Ninth Circuit Court of Appeals. On November 10, 1992 that Court dismissed the appeal for lack of jurisdiction. Thereafter, at a hearing before this Court on December 14, 1992, plaintiffs' motion for reconsideration of the Court's 1991 Order was denied and plaintiffs were expressly granted leave to amend their original complaint, which they did.

6. Plaintiffs' first amended complaint presents no new substantive issues: (1) one clause has been added to paragraph 10 of the material facts section to state that ERISA requires Hughes to distribute part of the surplus assets of the Plan; and (2) one clause has been added to paragraph 15 and a new paragraph 16 has been added to the first cause of action to allege in conclusory terms that the dispute over the distribution of surplus assets concerns the "provision of benefits and administration of the Plan." (First Amended Complaint ¶¶ 10, 15 and 16.) Plaintiffs elected not to amend either the second or third causes of action at all.

7. Plaintiffs now argue that the first amended complaint satisfies the test for the dissemination of plan information set forth by the Ninth Circuit Court of Appeals in Acosta v. Pacific Enterprises, 950 F.2d 611 (9th Cir. 1991). In Acosta, the Ninth Circuit noted that ERISA does not expressly state every duty of a fiduciary. Id. at 618. The court continued that ERISA Section 404(a), 29 U.S.C. § 1104(a), requires a fiduciary to discharge his "duties for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the Plan." Id. The Ninth Circuit further stated that, while the disclosure requirement for a plan fiduciary was not limited to the documents specified in the ERISA disclosure

provisions, 29 U.S.C. §§ 1021-1031, common law trust duties of disclosure:

> [M]ay be read into ERISA through Section 404(a) only to the extent that they relate to the provision of benefits or the defrayment of expenses, and only insofar as they do not contradict or supplant the existing reporting and disclosure provisions.

Id. The Court continued that this duty includes the obligation to inform beneficiaries of circumstances threatening "the funding of benefits," and the obligation to provide a participant threatened with loss of plan coverage complete information on the status and options. Id. at 619.

8. Plaintiffs' original complaint failed to satisfy the Acosta test for the reasons set forth in the July 1991 Order of Dismissal. Plaintiffs' inconsequential amendments likewise fail to bring plaintiffs' first amended complaint within the test set forth in Acosta. Not only is the surplus currently existing in the Plan possibly temporary given that it stems from good investment results but, more importantly, plaintiffs have alleged no facts that would establish any entitlement to the surplus. Plaintiffs have no right to force the Administrator to disclose information about that to which they are not entitled. In re Sears, Roebuck & Co. Securities Litig., 792 F. Supp. 977 (E.D. Penn. 1992) (citing to Acosta, court refused to require plan administrator to mail a proxy solicitation, on the grounds that "[f]or ERISA purposes, 'benefits' consist only of a 'right to receive monies'") (citation omitted).

9. Further, plaintiffs have not identified a sufficient nexus between the names and addresses they seek and the provision of benefits or defrayment of expenses to mandate disclosure. Plaintiffs do not seek the list of names and addresses to obtain information concerning the provision of benefits or the defrayment of expenses; rather, plaintiffs seek access to other participants primarily to gain support for negotiation or litigation to obtain surplus assets. (First Amended Complaint ¶ 10.) Thus, plaintiffs do not seek information at all; instead, they seek access to others to solicit financial support for their related case in which they hope to obtain the Plan's surplus assets.[4]

10. This conclusion is further buttressed by the fact that other Plan participants have no information about the payment of benefits, while the Administrator does. Plaintiffs do not, then, seek information about the provision of benefits from the Plan, whether pursuant to the Plan or under the provisions of ERISA.

11. For all the foregoing reasons, this Court holds that plaintiffs have failed to amend their first cause of action to require disclosure by the Plan Administrator of the list of the Plan participants' names and addresses under ERISA Section 404(a), 29 U.S.C. § 1104(a). Therefore, plaintiffs' amended first cause of action fails again to state a claim upon which relief can be granted. Further, plaintiffs have failed to make any amendment at all to their second and third causes of action, and those claims also fail to state a claim upon which relief can be granted.

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[4]The related case, also before the Court, is Jacobson, et al. v. Hughes Aircraft Company, et al., Civ. 92-4020-RB (Bx).

12. Assuming, as the Court must for the purposes of the Plan Administrator's motion to dismiss, that all the allegations of the first amended complaint are true, nevertheless plaintiffs have failed, as a matter of law, to state any valid claim. Moreover, plaintiffs have not claimed that any defect can be corrected by further amendment, and it is obvious plaintiffs cannot do so.

Based on the foregoing findings, the Court hereby orders that defendant Plan Administrator's motion to dismiss the first amended complaint in its entirety without leave to amend is granted, and that the action is dismissed on the merits with prejudice.

DATED: February 9, 1993

RICHARD A. GADBOIS, JR.
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

HUGHES SALARIED RETIREES ACTION COMMITTEE, PETER FORMO, RICHARD E. MILLER, AND AS MEMBERS AND NORMAN C. RIGBY, **Plaintiffs,** **vs.** **ADMINISTRATOR OF THE HUGHES NON-BARGAINING RETIREMENT PLAN,** **Defendant.**	**CASE NO. CV 91-0335-RG (Bx)** **ORDER OF DISMISSAL**

This cause came on for hearing on June 3, 1991, before the Honorable Richard A. Gadbois, Jr., United States District Judge, presiding, on defendant Plan Administrator's motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted and on plaintiffs' cross-motion for summary judgment under FRCP Rule 56. The Court, having heard the argument of counsel, being fully advised in the premises and having concluded that defendant Plan Administrator's motion to dismiss should be granted, finds as follows:

13. This action arises under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 et seq. Plaintiffs include individual participants in the Hughes Non-Bargaining Retirement Plan (the "Plan"), and an organization named the Hughes Salaried Retirees Action Committee, alleged to be made up of Plan participants.

14. Defendant in this action is the Administrator of the Hughes Non-Bargaining Retirement Plan (the "Plan Administrator").

15. The Complaint purports to state three causes of action, each alleging that the Plan Administrator violated various provisions of ERISA when it declined a request from one or more of the plaintiffs that it furnish a list of the Plan participants' names and addresses. Plaintiffs allege that the Plan Administrator is obligated to provide such information so that Plan participants may communicate with each other and be a "watchdog" on matters relating to the Plan. Plaintiffs do not, however, allege that the Plan has failed to provide any benefits due under the Plan. Rather, plaintiffs state that they seek the list "to gain support for their efforts to obtain increased benefits

through negotiation or if required, litigation . . . " (Complaint ¶ 10.)

16. In their first cause of action, plaintiffs allege that the Plan Administrator has a fiduciary duty, pursuant to ERISA Section 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B), to provide "a list of beneficiaries of the trust to Plan participants upon request when sought for purposes of communicating with the participants and beneficiaries of the Plan." (Complaint ¶ 15.)

17. ERISA contains a comprehensive scheme for reporting and disclosure which establishes the information which must be furnished to plan participants. ERISA Sections 101-111, 29 U.S.C. §§ 1021-1031. Nothing in those provisions expressly requires the disclosure of the information sought by plaintiffs.

18. Plaintiffs argue that even if ERISA's reporting and disclosure provisions do not require the Plan Administrator to furnish the requested information, there is a fiduciary duty to provide that information arising out of general principles of trust law which have been adopted by ERISA. Plaintiffs rely for their argument on a single state court decision from 1935 arising outside the context of employee benefit plans, as well as on general statements contained in secondary authorities.

19. In enacting ERISA, Congress chose to adopt "certain principles" of the common law of trusts. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989). However, it did not intend to incorporate state common law "lock, stock and barrel." Nieto v. Ecker, 845 F. 2d 868, 872 n.2 (9th Cir. 1988). As one court has explained, "[t]he claim that Congress intended for the

federal courts to create a body of federal common law to govern ERISA cases does not . . . give a federal court carte blanche authority to apply any prevailing state common law doctrine it chooses to ERISA cases." Nachwalter v. Christie, 805 F. 2d 956, 959 (11th Cir. 1986).

20. Because ERISA comprehensively addresses the information which participants should receive, the statute's fiduciary duty section should not be interpreted to mandate disclosure of additional information. As the court in Childers v. Northwest Airlines, Inc., 688 F. Supp. 1357 (1988) noted, the rationale underlying the unwillingness of courts to impose additional disclosure requirements beyond those provided by the statute is that:

> [F]iduciaries should be able to rely upon the detailed and uniform guidance ERISA provides with regard to disclosure requirements rather than bearing the practically impossible burden of anticipating, and comprehensively addressing, the individualized concerns of thousands of employees, especially without notice of these concerns.

Id. at 1361-62.

21. Moreover, whatever the precise duties of plan fiduciaries under Section 1104(a), those duties relate to and are limited to the obligations to provide benefits to plan participants and beneficiaries, to defray reasonable expenses in

administering the plan, and to act with the requisite care and skill in conducting the affairs of employee benefit plans. The purported duty to furnish participant lists upon request is not related to any of those purposes.

22. Even if this Court were to accept the proposition adopted by some courts that there is a fiduciary duty to furnish information beyond what is contained in the reporting and disclosure provisions, those holdings are inapposite. See, e.g., Eddy v. Colonial Life Ins. Co., 919 F. 2d 747 (D.C. Cir. 1990); Watkins v. Timber Operators Council, Inc., 12 E.B.C. 1312 (D. Ore. 1990). Such an obligation is limited, in its broadcast reading, to avoiding material misrepresentations and to furnishing complete material information to participants about their individual benefits to ensure that they are fully apprised of their rights and obligations under a benefit plan. The information requested here does not fall within the informational categories which those courts have held fiduciaries must disclose to plan participants.

23. In their second cause of action, plaintiffs allege that the Plan Administrator must furnish a participant list pursuant to ERISA Section 104(b)(4), 29 U.S.C. § 1024(b)(4) because the list is an "instrument under which the plan is established or operated." (Complaint ¶ 18.)

24. The section of ERISA relied upon by plaintiffs requires plan administrators to furnish, upon the written request of a participant or beneficiary, a "copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated."

25. In support of their interpretation of the statute, plaintiffs contend that a list of plan participants falls within the statute because the plan could not operate without the list. Such an interpretation so strains the meaning of the statute's language that it is impossible to conceive of any documents even tangentially related to an employee benefit plan which would not fall within its scope. Moreover, if there are limits, there is no way that plaintiffs' reading of the statute would allow a plan administrator to know what they are. Such a result would subvert the intent of Congress to provide "detailed and uniform guidance" as to what information must be furnished to plan participants. Chambless, supra, 571 F. Supp. at 1457.

26. Statutory construction of ERISA "'must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740, 105 S. Ct. 2380, 2389, 85 L. Ed. 2d 728, 740 (1985), quoting Park "N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194, 105 S. Ct. 658, 83 L. Ed. 2d 582 (1985). Following this approach, a list of plan participants cannot possibly be considered an instrument "under which the plan is established or operated." The plain language of the statute limits the universe of documents falling within that phrase to documents similar in nature to those specifically identified, which describe the terms and conditions of the plan, as well as its administration and financial status. While this Court need not define precisely those documents falling under that provision, it is clear that a list of plan participants does not. Obtaining such a list provides participants with absolutely no information whatsoever about the plan, and therefore ERISA neither requires nor contemplates its disclosure.

27. Plaintiffs' third cause of action alleges that by denying them the required information, the Plan Administrator failed to comply with the Plan provision which authorizes the Plan Administrator to "impose a reasonable charge to cover the cost of furnishing participants and beneficiaries upon their written request documents as required under Section 104(b)(4) of ERISA ...." (Complaint ¶ 22.)

28. By its terms, the provision applies only to those documents the Plan Administrator is statutorily required to provide to participants and beneficiaries under ERISA Section 104(b)(4), 29 U.S.C. 1024(b)(4). Because, for the reasons stated above, a participant list is not one of the documents required to be furnished pursuant to that section of ERISA, there is no obligation under the Plan to provide the requested information.

29. Plaintiffs' third cause of action also alleges that the Plan Administrator violated the terms of Article V, § 5.2 of the Plan, which they allege requires that the "Plan shall be administered, interpreted and applied fairly and equitably and in accordance with the specified purpose of the Plan." (Complaint ¶ 23.)

30. As a matter of law, the provision cited by plaintiffs cannot establish a substantive right to be furnished with a participant list where that obligation does not otherwise exist. Otherwise, such an hortatory clause would leave the Plan Administrator with absolutely no guidance as to its obligations, a result completely inconsistent with the intent of ERISA.

31. For all the foregoing reasons, this Court holds that ERISA Section 404(a), 29 U.S.C. § 1104(a) and ERISA Section 104(b)(4), 29 U.S.C. § 1029(b)(4) do not require disclosure by a plan's fiduciaries of a list of plan participants to

a plan participant, and therefore plaintiffs' first and second causes of action fail to state a claim upon which relief can be granted. Likewise, plaintiffs' allegation in their third cause of action that the Plan Administrator's refusal to furnish a participant list violated either ERISA Section 502(a)(1)(b), 29 U.S.C. § 1132(a)(1)(b) or ERISA Section 404(a)(1)(d), 29 U.S.C. § 1104(a)(1)(d) fails to state a claim upon which relief can be granted.

32. The Plan Administrator's motion for attorneys' fees is denied.

33. Having concluded that the Plan Administrator's motion to dismiss must be granted as a matter of law on the basis of the allegations made in the Complaint, plaintiffs' cross-motion for summary judgment is deemed moot.

Based on the foregoing findings, the Court hereby Orders that defendant Plan Administrator's motion to dismiss the Complaint in its entirety is granted, that the Plan Administrator's motion for attorneys' fees is denied, and that plaintiffs' cross-motion for summary judgment is deemed moot and thus taken off calendar.

DATED: July 9, 1991

Richard A. Gadbois, Jr.
United States District Judge

Supreme Court, U.S.
F I L E D
APR 10 1996
CLERK

No. 95-1434

In The

Supreme Court of the United States

October Term, 1995

HUGHES SALARIED RETIREES ACTION COMMITTEE, PETER FORMO, RICHARD E. MILLER and NORMAN C. RIGBY, Individually and as Members,

Petitioners,

vs.

ADMINISTRATOR OF THE HUGHES NON-BARGAINING RETIREMENT PLAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Administrator of the Hughes Non-Bargaining Retirement Plan (Administrator) respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Hughes Salaried Retirees Action Committee, Peter Forma, Richard E. Miller and Norman C. Rigby (Petitioners).

Review by this Court is unnecessary because (a) the decision of the Ninth Circuit Court of Appeals sitting *en banc* has established the rule to be followed with respect to the disclosure of plan participant lists, serving exactly the purpose for which such *en banc* courts are created, and there is no circuit conflict; (b) the Ninth Circuit found it unnecessary to reach one issue that is potentially significant, thus providing another reason why this Court should await further development in the law; (c) while the instant case may technically constitute a "final judgment" for this Court's jurisdictional purposes, at bottom the instant case is but a procedural prelude to the dispute on the merits, which is being litigated in a different case; (d) the decision not only does not conflict with any decision of this court, it in fact is consistent with this Court's holdings; and (d) the decision below is properly decided and this Court would simply affirm in any event.

I. STATEMENT OF THE CASE

The Hughes Non-Bargaining Retirement Plan (the Plan) has approximately 60,000 participants. In 1987, the value of the Plan's assets was more than $1 billion greater

than its current, accrued liabilities. This overfunding provided a tempting lure. The individual Petitioners, who receive defined pension benefits from the Plan, sought to solicit support from some 10,000 fellow retirees in an effort to exert pressure on their former employer, Hughes Aircraft Company (Hughes), to increase the retirees' pension benefits beyond the level defined by the Plan. When the Administrator refused their request to furnish the individual Petitioners with a list of the names and addresses of all retired participants of the Plan, Petitioners brought this action to obtain such a list supposedly "to communicate with them about matters of concern to all retired participants regarding their pensions." (App. 5a.) In particular, the Petitioners stated they wanted to communicate with other retirees about Hughes' alleged "unlawful use of excess Plan assets for the sole purpose of meeting Hughes' funding obligations" and "to gain support for their efforts to obtain increased benefits through negotiation or if required, litigation, as well as to monitor the Plan." (*Id.*)

Meanwhile, in a related matter, *Jacobson v. Hughes Aircraft Co.*, Docket No. 93-55392 (9th Cir.), five other retirees who received defined benefits from the Plan sought to terminate the entire Plan and to distribute the assets of the Plan to the participants, the majority of whom were current Hughes employees. The appeal from the District Court's dismissal of that claim is currently pending before the Ninth Circuit.

When the instant case – the names-and-addresses dispute – reached the Ninth Circuit, no other federal circuit had considered the reach of a plan fiduciary's obligation to make available a plan participant list either

under the reporting and disclosure provisions of ERISA or under the general fiduciary responsibility provisions of the Act. The Ninth Circuit, sitting *en banc*, definitively resolved this question, concluding first that the participant list is not an "instrument [ ] under which the plan is established or operated," and thus is not subject to disclosure under ERISA's plan instruments disclosure provision, ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4), and second that a plan administrator does not have a fiduciary duty to furnish such a list under ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A). (App. 4a, 5a.) The Ninth Circuit continued that, on this record, it need not resolve whether ERISA's general fiduciary provisions could require the disclosure of documents that are not required to be disclosed under ERISA's specific disclosure provisions, because here the participant list did not relate to the provision of benefits or the defrayment of expenses, and thus could not trigger any fiduciary disclosure obligation. (App. 13a.)

The Court of Appeals observed that the list Petitioners requested did not provide information or access to information about benefits or the Plan itself, but rather that Petitioners sought to use the list "to solicit financial support for future litigation" despite the fact that ERISA provides specifically for the recovery of costs and attorneys' fees by prevailing parties.[1] (App. 17a.) Petitioners now solicit this Court to intervene on the side of their campaign to seek financial support for their attempt to

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[1] If the *Jacobson* plaintiffs were to prevail on the merits, presumably they would claim costs and attorneys' fees under ERISA's fee provision, Section 502(g), 29 U.S.C. § 1132(g).

obtain the surplus Plan assets. In the instant case, in effect they seek a procedural victory that they hope will support *Jacobson*, the second lawsuit now pending before the Ninth Circuit. Respondent, the Plan Administrator, submits that there is no appropriate reason for this Court to do so.

II. REASONS FOR DENYING THE PETITION

A. The *En Banc* Decision Has Resolved The Participant List Issue, And There Is No Circuit Conflict.

The first reason for denying review is that this case presents a showcase example of the role *en banc* courts are created to fulfill. A statutory question now has been answered, and there is no reason for this Court to revisit that answer. Petitioners sued to force an administrator of a pension plan with thousands of participants to provide them the names and addresses of the plan participants even though no issue had arisen concerning the payment of the benefits defined under the Plan. The Ninth Circuit, *en banc*, answered that question and established a clear rule, finding that the participant list is not a plan instrument subject to disclosure on pain of the penalties enumerated in ERISA, and is not sufficiently related to the provision of benefits to trigger any additional fiduciary obligation to supply information. Petitioners do not suggest that this rule, now established, conflicts with any decision of another Court of Appeals.

There is no reason for this Court now to take up the issue. The Ninth Circuit having established the rule *en*

banc, this Court is in the position to await further developments in the law. If a conflict develops, this Court can resolve it in a later case. If none develops, the legal issue can remain settled unless and until Congress changes the law. Indeed, the policy issue is one especially well suited for Congress to resolve. The *en banc* ruling put to rest the fears of Amici Curiae Hughes Aircraft Retirees Association, Hughes Employees Association and Western Conference of Teamsters that disclosure of a participant list would invade the right to privacy of other participants and unnecessarily increase plan administrative costs. Balancing such policy interests against any interest that may be served by disclosure is best left to Congress, which is free to act should it wish to broaden ERISA's disclosure obligations beyond those it created in this "comprehensive and reticulated statute." *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980).

B. The Ninth Circuit's Decision Did Not Reach A Broader Fiduciary Issue; If This Court Ever Were To Want To Take A Case In This Area, It Should Await A Case In Which That Issue Has Been Resolved.

On the facts of the case, the Ninth Circuit was not required to decide whether disclosure of plan documents can ever be required under the general fiduciary duty provisions of ERISA rather than under the reporting and disclosure provisions. Whether disclosure obligations can arise from sources other than ERISA's disclosure provisions can and should await further development in the law. Again, there is no warrant now for this Court to intervene.

C. The Instant Case Is A Procedural Sideshow; *Jacobson*, Still In The Ninth Circuit, Presents The Substantive Issue.

The instant case is not insignificant – the Ninth Circuit found the issue important enough to hear it *en banc* – but at bottom it is a procedural prelude to the dispute on the merits. The merits case is *Jacobson*, pending in the Ninth Circuit. While the Ninth Circuit's decision in the instant case may well be a final judgment for jurisdictional purposes, from the standpoint of the dispute in its entirety, review at this time is premature. If Petitioners were to prevail on the merits in *Jacobson*, they would claim attorneys' fees under ERISA § 502(g), 29 U.S.C. § 1132(g), potentially mooting the funds-solicitation objective underlying the instant case. For this reason as well this Court's review now would be improvident.

D. The *En Banc* Decision Is Fully Consistent With The Decisions Of This Court.

While Petitioners argue that the Ninth Circuit's interpretation of ERISA's general fiduciary duty provision ignores a generalized "edict" of this Court, they totally ignore the fact that the *en banc* decision is specifically presaged by this Court's holding in *Curtiss-Wright Corp. v. Schoonejongen*, 131 L. Ed. 2d 94 (1995).[2] There this Court

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[2] Nothing in this Court's recent decision in *Varity Corp. v. Howe*, 64 U.S.L.W. 4138 (1996) affects this analysis. The Court had no question before it concerning the reach of ERISA's disclosure provisions, and the information there in question obviously related to benefits in a way that the instant case does not.

interpreted another fiduciary responsibility section, Section 402(b)(3), 29 U.S.C. § 1102(b)(3), which requires that an appropriate amendment procedure be part of a plan. Those respondents argued that the amendment procedure must include sufficient detail "to enable beneficiaries to learn their rights and obligations under the plan at any time," and thus serve an informational function. 131 L. Ed. 2d at 103. This Court responded that ERISA "has an elaborate scheme in place for enabling beneficiaries to learn their rights and obligations," and that scheme is based on "written plan documents." *Id.* The Court continued that the plan documents scheme is given effect "through a comprehensive set of 'reporting and disclosure' requirements, see 29 U.S.C. §§ 1021-1031, of which § 402(b)(3) is not part." *Id.*

After reviewing a number of ERISA's reporting and disclosure provisions, including the provision requiring an administrator to furnish information to participants pursuant to Section 104(b)(4), 29 U.S.C. § 1024(b)(4), which is the provision interpreted here, this Court refused to supplement Congress's informational scheme set out in the reporting and disclosure provisions by interpreting the fiduciary provision, Section 402(b)(3), to include an informational function. This Court stated:

> This may not be a foolproof informational scheme, although it is quite thorough. Either way, it is the scheme that Congress devised. And we do not think Congress intended it to be supplemented by a far-away provision in another part of the statute, least of all in a way that would lead to improbable results . . . .

131 L. Ed. 2d at 104.

Petitioners do not even argue that the Ninth Circuit's additional finding that the participant list is not a plan document ignores any "edict" of this Court. They do, however, assert that it is an important and unsettled question. But the Ninth Circuit settled the question, and in the manner suggested by *Curtiss-Wright*. There the Court considered the reach of ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4), stating:

> ERISA requires that every plan administrator make available for inspection in the administrator's "principal office" and other designated locations a set of all currently operative, governing plan documents, see § 1024(b)(2), which necessarily includes any new, bona fide amendments. See also § 1024(b)(4) (requiring plan administrators, upon written request, to furnish beneficiaries with copies of governing plan documents for a reasonable copying charge).

131 L. Ed. 2d at 103-04. By referring to "governing plan documents," or documents that set out the plan itself, the Court suggested that the administrator's obligation to turn over certain specified documents to participants did not include other documents, such as work papers, letters or participant mailing lists.

Petitioners' arguments, then, are far from the mark. The Ninth Circuit's interpretations of both the plan instruments and general fiduciary duty provisions not only are consistent with, they trace themselves from prior holdings of this Court.

Petitioners argue, however, that the *en banc* decision, to the extent that it rejects their fiduciary duty argument,

deviates from this Court's general pronouncement in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). (Pet. 6.) They claim that the Ninth Circuit has somehow reduced a right to information that, as we shall see *infra*, they erroneously assert existed at common law. *Bruch* is inapplicable here. The instant case presents a simple question of statutory interpretation that is resolved on the basis of the statutory language.

ERISA's general fiduciary duty provision, Section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A), requires a fiduciary to discharge his duties solely in the interest of participants and beneficiaries and for the exclusive purpose of "providing benefits to participants and their beneficiaires" and "defraying reasonable expenses of administering the plan." Hence, the focus of the inquiry below was whether the disclosure of the names and addresses was sufficiently related to the provision of benefits or defrayment of expenses to trigger any disclosure obligation under this general fiduciary provision. The Ninth Circuit analyzed the nature of the information sought to determine if it satisfied the express statutory requirement and concluded that "the right to solicit support for litigation that might result in greater pension benefits" is insufficiently related to the provision of benefits, the statutory touchstone. (App. 15a.)

Petitioners ignore this finding, grounded as it is in the statutory wording, and seek instead to invoke some purported right to communicate that should be left to

Congress to address.[3] Nothing in *Bruch* is to the contrary. Petitioners argue that the decision generally conflicts with this Court's pronouncement in *Bruch* that, as Petitioners recast it, "ERISA was enacted to promote the interests of employees and their beneficiaries in employee benefit plans and not to afford less protection to employees and their beneficiaries than they enjoyed under the common law before ERISA was enacted." (Pet. 6.)

Of course, this Court's decision in *Bruch* can in no way be interpreted as a mandate that ERISA must always be construed in a way that favors the claims asserted by plan participants. Nor did this Court in *Bruch* hold that Congress intended to incorporate the entire pre-existing body of state trust law (to the extent such a thing could even be defined) into ERISA "lock, stock and barrel." *Nieto v. Ecker*, 845 F.2d 868, 872 n.2 (9th Cir. 1988). To the contrary, just last month this Court observed that Congress did not intend the automatic and wholesale incorporation of trust law into ERISA: "[W]e believe that the law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties." *Varity Corp. v. Howe*, 64 U.S.L.W. 4138, 4140 (1996).

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[3] Significantly, although Petitioners first quote the two ERISA provisions brought in question by their petition, they then proceed to ignore those provisions in their discussion.

E. The *En Banc* Decision Is Correct.

Petitioners' fiduciary duty argument is based upon three unsupported and unfounded propositions: first, that in enacting ERISA, Congress intended to incorporate the entirety of trust law; second, that the common law of trusts clearly establishes the right of pension plan participants to obtain information about other participants; and third, that the *en banc* decision of the Ninth Circuit "substantially impaired and in some instances erased entirely" the ability of plan participants to enforce their rights under ERISA. (Pet. 12.)

Not only did Congress not incorporate the entire body of trust law, as already noted, but the fact that the common law of trusts is considered when interpreting ERISA in no way mandates the wholesale inclusion of any "principle" for which no clear case law authority is found emanating from the state courts.[4] Petitioners here once again cite the same few cases they relied upon before the Ninth Circuit, without so much as offering any response to the *en banc* Court's analysis of this meager authority.[5] That analysis, set forth in footnote 6 of the

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[4] See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300-02 (7th Cir. 1995), where the Court, by Chief Judge Posner, points out the absence of any "general" common law of torts, noting the distinctions in that law among the states, and holding that class certification was inappropriate as a result.

[5] Even farther afield is Petitioners' reference to the common law of corporations, involving issues of corporate democracy, corporate voting and corporate governance not presented here. (Pet. 9-10.)

Ninth Circuit's decision, undercuts Petitioners' arguments completely.[6] (App. 16a, n.6.)

Petitioners also advance the unsupported proposition that the rights of ERISA participants cannot be enforced without access to participant lists.[7] (Pet. 12.) This argument is belied by twenty years of the successful administration of ERISA. If Petitioners were right, one would think that their argument by this time would have been resolved. The lack of prior precedent outside the Ninth Circuit is mute evidence that Petitioners' claims are overblown. Moreover, Petitioners ignore altogether the Ninth Circuit's observation that the statute's attorneys' fees provision addresses specifically the concerns they raise. (App. 17a.) Petitioners in any event offer nothing in the way of evidence or argument that the ability to enforce statutory or plan rights is harmed, other than the implicit argument that in litigation, a bigger war chest is better

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[6] The only common law state court authority requiring the disclosure of names and addresses involved the solicitation of votes from co-beneficiaries of a voting trust (*Morris v. Broadview, Inc.*, 338 Ill. App. 99, 86 N.E. 2d 863 (1949)), and the solicitation of consents to assume control of the trust corpus (*Baydrop v. Second Nat'l Bank*, 120 Conn. 322, 180 A. 469 (1935)), far cries from the situation presented here. These two old, inapposite decisions hardly constitute a "body of law" at all, let alone one that Congress could be presumed to have incorporated by reference in enacting ERISA.

[7] Petitioners repeat this assertion as a part of their plan instrument argument under Section 104(b)(4), 29 U.S.C. § 1024(b)(4). (Pet. 15.) A participant list, however, is not an "instrument" or a "governing plan document," and it provides "no information about the plan or benefits," as the Ninth Circuit concluded. (App. 8a, 9a.)

than a small one. That argument, however, would just as readily warrant a finding that ERISA requires fiduciaries to directly fund lawsuits against themselves as it would a finding that they are required to do so indirectly by assisting participants in fundraising efforts.

Ultimately, Petitioners ignore the wealth of disclosure requirements and remedies Congress enacted in ERISA. Administrators are required, pursuant to the reporting and disclosure provisions in ERISA §§ 101-111, 29 U.S.C. §§ 1021-1031, to provide plan descriptions, summary plan descriptions, notice of modifications, annual reports and statements of benefit accruals to participants, among other documents. This case cannot be brought within those statutory rights. As for their litigation expenses, ERISA's administration and enforcement provisions allow recovery of any benefits due them and their attorneys' fees and costs. ERISA § 502(a), (g), 29 U.S.C. § 1132(a), (g). Of course, that is exactly what Petitioners will seek to do if they prevail in the related *Jacobson* case now pending before the Ninth Circuit.[8] Effectively, Petitioners seek to utilize this action to obtain premature discovery for their action on the merits, leading the *amici*

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[8] This Court's attorneys' fees jurisprudence has well established that even *prevailing* plaintiffs are not entitled to a fees windfall, *City of Burlington v. Dague*, 505 U.S. 557 (1992) (rejecting a "multiplier," even after success on the merits), or to interim fees awards short of clear-cut success on the merits, *Hanrahan v. Hampton*, 446 U.S. 754 (1980) (rejecting an interim fees award). By analogy here, petitioners should wait to see if they prevail in *Jacobson*, at least on an interim basis sufficient under the *Hanrahan v. Hampton* test, before being heard to contend that a federal statute gives them a basis for funding their litigation.

to express grave concern for their right to privacy and the excessive costs to the Plan that would attend the requested disclosure. (App. 19a, nn. 8, 9.) Not only is this the tail wagging the dog, but the balancing of such interests in competition with any interests that may be served by disclosure is, as the Ninth Circuit observed, best left to Congress. (App. 20a.)

III. CONCLUSION

For the foregoing reasons, the Administrator respectfully requests that the Court deny the Petition for Writ of Certiorari.

DATED: April 10, 1996

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HUGHES SALARIED RETIREES ACTION COMMITTEE, PETER FORMO, RICHARD E. MILLER and NORMAN C. RIGBY, Individually and as Members,

Petitioners,

vs.

ADMINISTRATOR OF THE HUGHES NON-BARGAINING RETIREMENT PLAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY

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REPLY ARGUMENT

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI AND HEAR THIS CASE, OR ALTERNATIVELY, VACATE THE JUDGMENT AND REMAND THE CASE TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FOR FURTHER CONSIDERATION IN LIGHT OF THE COURT'S DECISION IN *VARITY V. HOWE* 2

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FEDERAL STATUTES

Employee Retirement Income Security Act ("ERISA"),
29 U.S.C. Section 104 1

Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") 8

H.R. Rep. No. 93-533, pp. 3-5, 11-13 (1973) 3

Privacy Act, 5 U.S.C. § 552a 7

MISCELLANEOUS

G. Bogert & G. Bogert, *The Law of Trusts and Trustees*
(Rev. 2d Ed. 1978) 4

REPLY STATEMENT

In the period between the filing of the Petition and Respondent's Reply Brief this Court decided *Varity Corporation v. Howe*, _ U.S._, 116 S.Ct. 1065, 64 USLW 4138, No. 94-1471 (March 19, 1996). As will be shown below, *Varity* strongly suggests that this Court grant the petition for writ of certiorari and hear this case, or alternatively, vacate the judgment and remand the case to the United States Court of Appeals for the Ninth Circuit for further consideration in light of it.

REPLY ARGUMENT

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI AND HEAR THIS CASE, OR ALTERNATIVELY, VACATE THE JUDGMENT AND REMAND THE CASE TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FOR FURTHER CONSIDERATION IN LIGHT OF THE COURT'S DECISION IN *VARITY V. HOWE*

The primary question in the present case is whether Section 404 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. Section 1104, ERISA's fiduciary duty provision, preserves the existing common-law duty of a trust fiduciary to provide a beneficiary with the trust's list of names and addresses of other beneficiaries, or some alternative means, to communicate with them about the payment of benefits or administration of the trust. The en banc panel of the Court of Appeals of the Ninth Circuit, by a 7-4 vote reversing the original decision of that Court, held that ERISA's fiduciary provision did not preserve this common-law duty of the fiduciary.[1] In *Varity*

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[1] While the en banc decision skirted the issue of whether ERISA's disclosure provision's (Section 104) listing of certain documents to be disclosed means that the fiduciary has no duty under Section 404 to disclose any others, it is nonetheless obviously an issue in this case (*see* Respondent's Brief, Point II(D) at p.6) and may be properly addressed by this Court. This Court implicitly rejected that argument by the language and logic of *Varity* and left it ripe for future determintation. In order for this Court to decide whether the common law duty to produce a list of beneficiaries is preserved by ERISA it must necessarily decide this in light of the express disclosure provisions of ERISA. The issue of whether the express disclosure provisions of ERISA Section 104 mandate production of the list (as argued by the Petitioners' and rejected by (continued...)

Corporation v. Howe, supra, this Court interpreted and applied the general fiduciary duty provision of ERISA and held:

> "In doing so, we recognized that these fiduciary duties draw much of their content from the common law of trusts, the law that governed most benefit plans before ERISA's enactment. *See Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985) (("[R]ather than explicitly enumerating *all of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility"); H.R.Rep. No. 93-533, pp. 3-5, 11-13 (1973), 2 Legislative History of the Employment Retirement Income Security Act of 1974 (Committee Print compiled for the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare by the Library of Congress), Ser. No. 93-406, pp. 2350-2352, 2358-2360 (1976) (hereinafter Leg. Hist.); G. Bogert & G. Bogert, Law of Trusts and Trustees Section 255, p. 343 (rev. 2d ed. 1992).

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[1](...continued)
the Court of Appeals) is directly raised in this petition. If this Court rejects that argument it must of course decide whether production of the list may still be required by the fiduciary duty provisions. *Varity* leaves that issue ripe for determination and this case is an ideal one in which to decide it if required.

> We also recognize, however, that trust law does not tell the entire story. After all, ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection...In some instances, trust law will offer only a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements. And, in doing so, courts may have to take account of competing congressional purposes, such as Congress' desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place."

116 S.Ct. at 1070. *Varity* is decisive and requires the reversal of the en banc panel's decision herein because this Court has clearly held that ERISA's fiduciary provision is based upon, incorporates and was intended to enhance the common-law fiduciary duties of a trustee, while the en banc decision rests on the premise that ERISA's fiduciary provision was intended to displace the common-law duty of fiduciaries to produce a list of

beneficiaries when requested in connection with the administration of the trust.[2]

This Court in *Varity* specifically and pointedly cites *Bogert & Bogert*, the premier treatise on the common law of trusts, while the en banc panel held that *Bogert & Bogert* is inapplicable and "adds nothing" to the understanding of the general fiduciary standard in ERISA Section 404. The issue is crucial and determinative because, as *Bogert & Bogert* reflect, a common-law duty of a fiduciary is to permit the beneficiaries of a trust access to the list of names and addressing to be able to communicate with fellow beneficiaries concerning the trust's

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[2] Respondent cites *Curtiss- Wright Corp. v. Schoonenjongen,* U.S. , 115 S.Ct.1223, 131 L.Ed. 2d 94 (1995) for its argument that ERISA's comprehensive disclosure scheme precludes reliance on the fiduciary duty provisions of ERISA for obtaining further disclosure. As noted above, this issue is left ripe for determination by *Varity,* which expressly states that a fiduciary's duty may require disclosure beyond that which is specified in the disclosure provisions. Moreover, as pointed out in the orginal petition, this Court held in *Curtiss- Wright,* 115 S.Ct. at 1231, that in determining the validity of an amendment of a trust document under ERISA, where the company, as here, was the plan fiduciary, the courts are to look to ordinary principles of trust and corporate law . 115 S.Ct. 1223 at 1231.

benefits and administration.[3] There is no realistic claim here that this duty was limited by Congress' concern not to increase benefit plan costs, since the provision of the list to the beneficiaries herein was essentially without cost to the plan and any costs would be reimbursed by the Petitioners. Indeed, in lieu of provision of the list, petitioners sought a mailing through the plan itself at cost to the petitioners.

Additionally, this Court in *Varity* held that ERISA did not reduce or limit fiduciaries' duties by explicitly enumerating them. In addition to the discussion excerpted above, the *Varity* decision held:

> "There is more to plan (or trust) administration than simply complying with the specific duties imposed by the plan documents or statutory regime; it also includes the activities that are "ordinary and natural means" or achieving the "objective" of the plan. Bogert & Bogert, supra, Section 551, at 41-52. ...If the fiduciary duty applied to nothing more than activities already

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[3] G. Bogert & G. Bogert, *The Law of Trusts and Trustees* (Rev. 2d Ed. 1978), § 961, p. 7, states squarely that a "***beneficiary may demand a list of the other beneficiaries....***"

> controlled by other specific legal duties, it would serve no purpose." 116 S.Ct. at 1073.

The *Varity* decision affirms the holding of the original panel below in the present case, that ERISA's fiduciary provision, Section 404, is a broad protection and enhancement of fiduciary duties to trust beneficiaries. Surely the basic right to communicate with fellow beneficiaries with respect to trust matters such as benefits and plan administration, recognized at common law and by the premier authority on trust law, is within ERISA's fiduciary provision.

Lastly, Respondent alludes to the "privacy concerns" expressed by the "amici" below. The Court should note that two of these "amici" are retiree and employee organizations officially sponsored by Hughes Aircraft. Moreover, the reference to *U.S. Department of Defense v. F.L.R.A.*, --US--, 114 S.Ct. 1006 (1994), is misplaced. That case involved the disclosure of names and addresses of public employees to a

union under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") when the privacy of the employees involved was expressly protected by the Privacy Act, 5 U.S.C. § 552a. Here, neither FOIA nor the Privacy Act is applicable. Hughes Aircraft is a private company. A private employer, such as Hughes Aircraft, must produce a list of the names and addresses of all employees so that the union can communicate with them before a union election. *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966). This Court has directed enforcement of the N.L.R.B.'s subpoena directing an employer to produce such a list. *N.L.R.B. v. Wyman Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426 (1969) the N.L.R.B. has rigorously enforced this rule for over 30 years. The only other amicus brief below was filed by a Teamster pension fund. It is noteworthy that of all union pension funds, only the Teamsters submitted a brief below to prevent retirees from contacting fellow plan participants for help in policing the plan which provides their benefits. ERISA was enacted, in part, to prevent abuses by union pension funds, especially the

Teamsters. Not only have abuses by many other Teamster funds been checked by ERISA,[4] and not only has the International Brotherhood of Teamsters (the "Teamsters International") settled a federal RICO suit by agreeing to court supervision[5], but the very fund which filed the amicus brief also has a reported history of abuses. *United States v. Teamsters*, 964 F.2d 180 (2d Cir. 1992).

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[4] *See*, e.g., *Donovan v. Fitzsimmons*, 778 F.2d 298 (7th Cir. 1985) (approving settlement of class action asset mismanagement and improper benefit structure claims against Teamsters Central States Pension Fund); *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682 (7th Cir. 1986) (permitting Secretary to pursue further claims notwithstanding settlement); *Katsaros v. Cody*, 744 F.2d 270 (2d Cir.), *cert. denied*, 469 U.S. 1072 (1984) (fund trustees found liable for losses and replaced by Court-appointed managers); *Marshall v. Snyder*, 572 F.2d 894 (2d Cir. 1978) (receiver appointed and improper transactions by fund enjoined); *McDougall v. Donovan*, 552 F.Supp. 1206 (N.D. Ill. 1982) (purchase from the union at above-market value of a jet plane found improper).

[5] *See United States v. Teamsters*, Consent Decree entered March 14, 1989 (S.D.N.Y.)

Conclusion

For these reasons, we respectfully urge that the Court should grant the writ of certiorari and hear the appeal or vacate the judgment and remand the case the to United States Court of Appeals for the Ninth Circuit for further consideration in light of this Court's decision in *Varity v. Howe*.

Dated: New York, New York
April 18, 1996

Respectfully submitted,

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